(16)

No. 95-345-CFX Title: United States, Petitioner

Status: GRANTED

Guy Jerome Ursery

Docketed: Court: United States Court of Appeals for

August 28, 1995 the Sixth Circuit

Note

Vide: Counsel for petitioner: Solicitor General

95-346

Entry Date

Counsel for respondent: Emery, Lawrence J.

Proceedings and Orders

See also: 95-346

1	Aug	28	1995	G	Petition for writ of certiorari filed.
3			1995		
2	Sep	26	1995		Brief of respondent Guy Jerome Ursery in opposition filed.
4			1995		DISTRIBUTED. November 22, 1995 (Page 2)
5	Nov	15	1995	X	Reply brief of petitioner filed.
6			1995		REDISTRIBUTED. January 12, 1996 (Page 1)
7	Jan	12	1996		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jan	12	1996		Petition GRANTED. The brief of petitioner is to be filed
					with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The briefs of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March
					22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.
9	Tan	26	1996	-	
11			1996		
10			1996		SET FOR ARGUMENT WEDNESDAY, APRIL 17, 1996. (1ST CASE). Motion for appointment of counsel GRANTED and it is
					ordered that Lawrence J. Emery, Esquire, of Lansing, Michigan, is appointed to serve as counsel for the respondent in this case.
12	Feb	21	1996	G	Application (A95-693) for leave to file a consolidated merits brief in excess of the page limits, submitted to Justice Stevens.
13	Feb	21	1996		Application (A95-693) granted by Justice Stevens, allowing a maximum of 60 pages.
14	Feb	23	1996		Joint appendix filed. VIDED.
15	Feb	23	1996		Brief of petitioner United States filed. VIDED.
16	Feb	23	1996	G	Motion of Americans for Effective Law Enforcement, et al. for leave to file a brief as amici curiae filed.
17	Feb	23	1996		Brief amici curiae of Connecticut, et al. filed. VIDED.
18	Feb	23	1996		Brief amicus curiae of Thirty-Nine Counties of the State of Washington filed. VIDED.
19	Feb	23	1996		Brief amici curiae of Counties of San Bernardino, et al. filed. VIDED.
20	Feb	23	1996		Brief amici curiae of Cook County State's Attorney's Office, et al. filed. VIDED.
21	Mar	4	1996		Motion of Americans for Effective Law Enforcement, et

Entry		Date	e .	Not	Proceedings and Orders
					al. for leave to file a brief as amici curiae GRANTED.
22	Mar	8	1996	G	Motion of respondents for divided argument and for additional time for oral argument filed.
23	Mar	8	1996		CIRCULATED.
24	Mar	18	1996		Record filed.
				*	Record proceedings U.S. Court of Appeals, Sixth Circuit and U.S. District Court, Eastern District/Michigan (BOX)
26	Mar	22	1996	X	Brief amicus curiae of Amercan Civil Liberties Union filed. VIDED.
27	Mar	22	1996	X	Brief of respondent Guy Jerome Ursery filed.
25			1996		Motion of respondents for divided argument and for additional time for oral argument GRANTED. Twenty additional minutes are allotted for this purpose. to be divided as follows: 40 minutes - Solicitor General; 20 minutes - respondent Ursery; 20 minutes - respondents \$405,089.23, et al.
28	Mar	27	1996	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
29	Apr	10	1996	X	Reply brief of petitioner filed. VIDED.
30	Apr	17	1996		ARGUED.
31	Apr	22	1996		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.

95 · 3 4 5 AUG 2 8 1995

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DREW S. DAYS, III Solicitor General

JO ANN HARRIS Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

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Assistant to the Solicitor General

Daniel S. Goodman Attorney Department of Justice Washington, D.C. 20530 (202) 514-2217



QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for manufacturing marijuana because the government obtained a consent judgment in a civil action that sought the forfeiture of property of respondent on the ground that it facilitated illegal drug activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeoparay claim (App., infra, 38a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841 and 881 are reproduced at App., infra, 49a-71a.

STATEMENT

1. On July 30, 1992, police officers executing a warrant at respondent's property discovered 142 marijuana plants growing on land just outside the boundaries of the property. Inside respondent's house, the officers discovered marijuana seeds, stems, and stalks, two loaded firearms, and a growlight.

App., infra, 2a.

On September 30, 1992, the government filed a civil complaint, pursuant to 21 U.S.C. 881(a)(7), seeking forfeiture of respondent's residence. App., infra, 2a-3a. The complaint alleged that, "[f]or several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance." Id. at 29a. The court scheduled the trial of that action for July 1993. Before trial, however, respondent and his wife entered into a settlement under which they agreed to pay the government \$13,250 in lieu of the forfeiture. Id. at 32a-34a. A consent judgment embodying that agreement was entered on May 24, 1993. Id. at 35a-37a.

On February 5, 1993, while the civil action was pending, a federal grand jury returned a criminal indictment charging respondent with one count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). App., infra, 3a. A jury trial on that

charge commenced on June 30, 1993, and concluded with respondent's conviction on July 2, 1993. *Ibid*. Following his conviction, respondent moved to dismiss the indictment on the ground that his "conviction constitute[d] double jeopardy, as a result of the civil forfeiture proceeding instituted and concluded in favor of the government before his conviction." *Id.* at 38a. The district court denied that motion, explaining that the consent judgment in the forfeiture action was not an "adjudication" and that, in any event, the forfeiture and the criminal conviction were two components of "a single, coordinated prosecution." *Id.* at 39a. Respondent was sentenced to 63 months' imprisonment. *Id.* at 44a.

2. A divided panel of the Sixth Circuit reversed respondent's criminal conviction on the ground that the conviction was "a second punishment that violates the Double Jeopardy Clause." App., infra, 6a. The court first rejected the district court's view that the consent decree in the civil forfeiture proceeding was not an "adjudication" for double jeopardy purposes. By analogy to cases in which a criminal defendant pleads guilty pursuant to a plea agreement, the court concluded that jeopardy attached in the forfeiture proceeding when the court accepted the stipulation of forfeiture and entered a judgment of forfeiture

against respondent. Id. at 7a.

The court next concluded that "any civil forfeiture under [] 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." App., infra, 11a. The court believed that under United States v. Halper, 490 U.S. 435 (1989), and Austin v. United States, 113 S. Ct. 2801 (1993), such forfeitures are punitive because they do not "serve solely a remedial purpose." App., infra, 10a. The court also held that

under the "elements" test of Blockburger v. United States, 284 U.S. 299 (1932), the civil forfeiture and the criminal conviction were "punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense," and therefore the criminal offense "is in essence subsumed by the forfeiture statute." App., infra, 12a.

Finally, the court rejected the district court's conclusion that the civil forfeiture and criminal actions were a "single proceeding" for purposes of the Double Jeopardy Clause. App., infra, 13a-17a. The court recognized that "[t]here is disagreement among the circuits * * * as to when a civil forfeiture action and criminal prosecution can properly be considered components of a single proceeding so that double jeopardy is not triggered." Id. at 14a (citing cases). It also "acknowledge[d]" but "f[ou]nd it unnecessary to fully adopt" the Ninth Circuit's suggestion in United States v. \$405,089.23, 33 F.3d 1210, 1216 (1994), amended on denial of reh'g, 56 F.3d 41 (1995), petition for cert. pending, No. 95- ---, that "parallel civil forfeiture and criminal proceedings will always violate the Double Jeopardy Clause." App., infra, 15a-16a. In the instant case, the court concluded, there was "no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution" of respondent "as a coordinated proceeding." Id. at 16a.

Judge Milburn dissented. App., infra, 19a-27a. He argued that this case involved "a sufficiently coordinated proceeding" to dispel double jeopardy concerns. Id. at 20a. Judge Milburn noted that the Eleventh Circuit in United States v. One Single Family Residence, 13 F.3d 1493 (1994), concluded that civil and criminal proceedings were sufficiently coordinated to be the same case for double jeopardy

purposes even though an indictment was returned five months after the civil forfeiture action was instituted, and the civil and criminal judgments were entered at different times. App., infra, 21a n.2. The key to that conclusion, Judge Milburn contended, was a recognition that contemporaneous civil and criminal proceedings do not ordinarily raise the specter that the government is seeking to punish the defendant a second time simply because it is dissatisfied with the sanction it obtained at a first trial. Ibid.

Following the lead of the Eleventh Circuit, and of the Second Circuit in United States v. Millan, 2 F.3d 17 (1993), cert. denied, 114 S. Ct. 922 (1994), Judge Milburn urged that the potential for government abuse should be the central factor in determining whether contemporaneous civil and criminal actions are a "single proceeding" for double jeopardy purposes. He concluded that the civil and criminal actions in this case were indeed a single proceeding, because they "took place in close time proximity to one another," id. at 22a, respondent understood when he settled the forfeiture action "that the government was pursuing its full range of remedies against him," ibid., the government instituted both the civil forfeiture action and the criminal action "before it knew the outcome of either case," id. at 22a-23a, and the total punishment imposed in the coordinated proceeding did not exceed the punishment authorized by Congress, id. at 25a.

Judge Milburn also disagreed with the majority's conclusion that the civil forfeiture and the crime for which respondent was convicted were "the same offense." App., infra, 26a-27a. He noted not only the different statutory elements of each "offense." but

also that the forfeiture complaint and the indictment alleged different theories of liability. The indictment charged respondent "with the manufacture of marijuana only during the year 1992" while the civil forfeiture complaint alleged that respondent's "property was involved in the commission or facilitation of both processing and distribution of a controlled substance over the course of several years." *Id.* at 26a, 27a. "Under those circumstances," he concluded, "the criminal prosecution and the civil forfeiture action would undoubtedly relate to separate offenses under the Double Jeopardy Clause." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

This case presents three related and important issues under the Double Jeopardy Clause. First, the Sixth Circuit erroneously concluded that the civil forfeiture of property used to facilitate criminal activity necessarily constitutes "punishment" under the Double Jeopardy Clause. Second, in concluding that the civil forfeiture and criminal conviction inflicted punishment for the "same offense," the Sixth Circuit misapplied this Court's decision in Blockburger v. United States, 284 U.S. 299 (1932), and its progeny, which hold that two offenses are not the "same" if each has an element that the other does not have. Third, as Judge Milburn argued in dissent, the Sixth Circuit's conclusion that the civil and criminal actions against respondent and his property must be deemed "separate proceedings" serves no valid interest protected by the Double Jeopardy Clause. As with the Ninth Circuit's ruling in United States v. \$405,089.23 (see 33 F.3d 1210 (1994), amended on denial of reh'g, 56 F.3d 41 (1995)), in which we have also filed a petition for a writ of certiorari, the Sixth Circuit's rulings exacerbate a circuit conflict on the extent to which the government may pursue factually related civil forfeiture and criminal actions. Accordingly, this Court's review is warranted.

1. Traditionally, the civil forfeiture of property involved in criminal activity and the criminal prosecution of the property's owner for the same underlying conduct did not raise issues under the Double Jeopardy Clause. See, e.g., United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-366 (1984); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931). As we explain more fully in our petition in United States v. \$405,089.23, however, in which we seek review of the Ninth Circuit's conclusion that the forfeiture of proceeds of narcotics activity always must be deemed "punishment" for double jeopardy purposes, the lower courts are deeply divided on the question whether. or to what extent, this Court's decisions in United States v. Halper, 490 U.S. 435 (1989), Austin v. United States, 113 S. Ct. 2801 (1993), and Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994), have changed that rule.

The Sixth Circuit held that the civil forfeiture of property used or intended to be used to facilitate drug trafficking always imposes "punishment" for double jeopardy purposes and that, under Halper, such a forfeiture bars a subsequent criminal punishment. The Court in Halper, however, cautioned that it was announcing a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a [civil] sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction

"may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. As Halper recognized, the government may exact civil sanctions that achieve "rough remedial justice" without raising double jeopardy concerns. Accordingly, under Halper, it is ordinarily necessary to examine the particular civil sanction imposed on a case-by-case basis to determine whether it constitutes "punishment" for double jeopardy purposes. Id. at 446; see also id. at 452-453 (Kennedy, J., concurring).

This Court's decision in Austin v. United States, supra, does not require a categorical approach to forfeiture statutes for purposes of double jeopardy analysis. Austin held that the forfeiture provisions of 21 U.S.C. 881(a)(7)—the same statute at issue here -impose "punishment" for purposes of the threshold applicability of the Eighth Amendment's Excessive Fines Clause. The Court suggested that the forfeiture provisions involved in that case were sufficiently bound up with the culpability of the property's owner as to render those provisions punitive in all applications, 113 S. Ct. 2806-2810, 2812 & n.14, and the Sixth Circuit found that conclusion dispositive of the punishment issue in the double jeopardy context as well. App., infra, 10a-11a. Austin recognized, however, that it "ma[de] little practical difference" in that case whether the Excessive Fines Clause was held to apply to all forfeitures under the statutes at issue in that case, "or only to those that cannot be characterized as purely remedial." 113 S. Ct. at 2812 n.14. That was true because the Eighth Amendment is relevant only when a fine is excessive and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." Ibid.

In the double jeopardy context, a departure from Halper's case-by-case approach to the issue whether a particular civil sanction inflicts punishment has enormous practical consequences. In that setting, a categorical conclusion that all civil forfeitures under the statute at issue constitute punishment may completely bar a later criminal prosecution of the owner. even if the particular prior civil forfeiture was fairly characterized as substantially remedial. See Austin, 113 S. Ct. at 2805 n.4 (citing 89 Firearms and recognizing that statutory forfeitures may be wholly remedial). That result would greatly expand Halper's rule for the "rare case," 490 U.S. at 449, and would dramatically alter the common practice of pursuing both forfeiture of offending property as a civil remedy and punishment of its owner as a criminal remedy. Neither Halper nor a proper application of double jeopardy principles would support such a rule.1

The punishment issue raised by this case differs to some extent from the analogous question presented by our petition in \$405,089.23. Here, the complaint sought forfeiture of respondent's property on the theory that the property was used or intended to be used to facilitate the commission of a criminal offense. In \$405,089.23, forfeiture was sought on the theory that the property represented the ill-gotten gains

¹ This Court's double jeopardy decision in Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994), that a particular state tax on the possession of dangerous drugs constituted punishment in all of its applications does not suggest otherwise. The analysis in that case was tailored to the specific nature and purposes of a tax statute, see id. at 1946, 1948, not to civil forfeitures or to other civil sanctions that may serve remedial aims, see 89 Firearms, supra.

from criminal activity. The Court's resolution of the punishment issue in \$405,089.23 therefore will not necessarily resolve the analogous question in cases like this one. At the same time, the extent to which this Court's decisions since Halper changed the double jeopardy principles that have long applied to civil forfeitures of property used to commit criminal offenses has divided the lower courts, compare App., infra, 11a, with United States v. Morgan, 51 F.3d 1105, 1113 (2d Cir. 1995) ("we have held that Halper does not apply to forfeiture claims") (citing United States v. \$145,139, 18 F.3d 73, cert. denied, 115 S. Ct. 72 (1994)), petition for cert. pending, No. 95-14 (July 3, 1995), and has generated considerable litigation throughout the country. For that reason, this case merits this Court's plenary consideration.

2. Even if the Sixth Circuit were correct in concluding that a civil forfeiture of property used or intended to be used to facilitate a narcotics offense must always be considered "punishment" for an "offense" for double jeopardy purposes, the court was wrong to treat the forfeiture "offense" as the "same offense" as the narcotics crime for which respondent was punished. Under Blockburger v. United States, 284 U.S. 299 (1932), whether two offenses are the "same" for double jeopardy purposes does not turn on whether the same illegal conduct was involved in both, but on a comparison of the elements that the government must prove to prevail under each. See Witte v. United States, 115 S. Ct. 2199, 2204 (1995); United States v. Dixon, 113 S. Ct. 2849, 2856 $(1993).^{2}$

The Sixth Circuit concluded that the forfeiture and criminal "offenses" were the "same" in this case on the theory that the narcotics crime is a lesser-included offense of the forfeiture—"[t]he criminal offense is in essence subsumed by the forfeiture statute." App., infra, 12a. That reasoning disregards the controlling decisions of this Court, which make clear that one "offense" is included within another only if every conceivable application of the "greater" offense necessarily establishes the existence of the "included" offense. See United States v. Woodward, 469 U.S. 105, 108 & n.4 (1985) (per curiam); Brown v. Ohio, 432 U.S. 161, 168 (1977) (offense is lesser-included under Blockburger if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); accord Schmuck v. United States, 489 U.S. 705, 716 (1989).

The statute that authorizes forfeiture does not "necessarily" require proof that the property's owner engaged in marijuana manufacturing; forfeiture may be appropriate if the property in question facilitated any narcotics violation committed by anyone, even if that person is not the owner. See Origet v. United States, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offense may be an entirely different person from the owner of the merchandise, or any person interested in it"); see also Austin, 113 S. Ct. at 2810 n.11. Indeed, forfeiture is authorized by 21 U.S.C. 881(a)(7) even if the property was

² In Dixon, 113 S. Ct. at 2860, the Court overruled the "same-conduct" rule of Grady v. Corbin, 495 U.S. 508 (1990),

under which a subsequent prosecution was generally prohibited if the government, to establish an essential element of that prosecution, would have to prove conduct that constituted an offense for which the defendant had already been prosecuted.

merely "intended" for use in a narcotics offense. Conversely, "the substantive criminal provision under which [respondent] was prosecuted[] does not render unlawful an intention to [manufacture marijuana]; only the completed act of [manufacturing marijuana] is made a crime" by 21 U.S.C. 841(a), 89 Firearms, 465 U.S. at 363-364, and then only if committed with criminal intent. In those circumstances, the Sixth Circuit erred in concluding that the narcotics crime was necessarily included within the forfeiture "offense."

3. Finally, the Sixth Circuit was also wrong to conclude that the parallel civil and criminal actions in this case did not constitute a "single proceeding" for double jeopardy purposes. While recognizing a split in the circuits on whether parallel civil and criminal actions may be deemed a "single proceeding," App., infra, 14a, the Sixth Circuit exacerbated that division of authority. The Sixth Circuit declined to adopt the Ninth Circuit's conclusion that parallel actions may never be considered a single proceeding. It also rejected the Second and Eleventh Circuit's view that such parallel actions generally do not present the potential for abuse that the Double Jeopardy Clause is designed to prevent—i.e., that the government "is

seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." Halper, 490 U.S. at 451 n.10. Instead, as Judge Milburn noted in dissent, App., infra, 22a, the Sixth Circuit adopted "a case-by-case comparison of the level of coordination" that is unrelated to the purposes of the Double Jeopardy Clause.

Nothing suggests that the government commenced the criminal prosecution against respondent out of dissatisfaction with the result obtained in the civil proceeding. Respondent was indicted in February 1993, long before the outcome of the forfeiture proceeding was known. Indeed, the forfeiture action was scheduled for trial in June 1993. The government's simultaneous pursuit of these cumulatively available remedies does not suggest any intent to obtain double punishment in sequential proceedings. Rather, it reflects the fact that civil and criminal actions cannot be formally joined in our system of procedure. And, although respondent elected to resolve the civil part of the case by settlement, he "knew at the time of the settlement in the civil forfeiture action that a criminal action was pending." App., infra, 23a (Milburn, J., dissenting). He was therefore aware "that the government was pursuing its full range of remedies against him." Id. at 22a. Those circumstances do not be peak the type of government overreaching that calls into action the doctrine against multiple punishments in successive proceedings. See Halper, 490 U.S. at 451 n.10.

4. The decision in this case will have a substantial and adverse impact on the administration of justice in the Sixth Circuit. The United States will justifiably be reluctant to commence, prosecute, or settle

³ Nor does the crime of manufacturing marijuana require proof that any property was used, or intended for use, to facilitate the production of the contraband. See 21 U.S.C. 841(a)(1). Indeed, the marijuana plants that formed the basis for respondent's conviction were growing beyond respondent's property line (App., infra, 2a), and it was the additional discovery of items such as marijuana seeds, a growlight, and firearms on the property that supported the forfeiture action.

civil forfeiture actions expeditiously if by so doing it necessarily precludes the prosecution of serious criminal offenses. Moreover, as the experience of the Ninth Circuit demonstrates, the decision below is likely to engender literally hundreds of motions to dismiss indictments, post-trial motions for relief, and collateral attacks on existing judgments. That consequence will add substantial delay to the adjudication of defendants' guilt and require burdensome post-trial litigation over settled criminal convictions.

Both the Sixth Circuit's decision and the Ninth Circuit's decision in \$405,089.23, in which we have also filed a petition for a writ of certiorari, are before the Court at the same time. As we explain in our petition in \$405,089.23, we believe that the Court should grant certiorari and give plenary consideration to both cases. While the two cases present similar double jeopardy issues, those issues arise in somewhat different factual and legal contexts that may illuminate the Court's consideration of the problem. In particular, as we have noted, \$405,089.23 involves property alleged to be the "proceeds" of criminal activity, not property alleged to have been used or intended for use to facilitate the commission of a narcotics offense. In order to ensure that this

Court has a full opportunity to explore the double jeopardy issues that continue to divide the lower courts, we respectfully suggest that the Court grant certiorari in both cases and consolidate them for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
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AUGUST 1995

⁴ Because this case involves a civil proceeding that the Sixth Circuit believed was followed by a constitutionally separate criminal prosecution, consideration of this case together with \$405,089.23 may also allow the Court to settle a question that was expressly left undecided in Kurth Ranch, i.e., what significance the order of the proceedings has in the double jeopardy analysis, see 114 S. Ct. at 1947 n.21, including questions as to the appropriate remedy. In this connection, we note that in remanding for further proceedings, Halper itself suggested that a second sanction would be barred only to the extent that it was punitive, 490 U.S. at 449-450, 452, and that this Court's

cases support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, e.g., Jones v. Thomas, 491 U.S. 376, 380-387 (1989); Morris v. Mathews, 475 U.S. 237, 244-247 (1986).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 94-1127

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY JEROME URSERY, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Eastern District of Michigan

Decided and Filed July 13, 1995

Before: JONES, CONTIE, and MILBURN, Circuit Judges.

JONES, J., delivered the opinion of the court, in which CONTIE, J., joined. MILBURN, J. (pp. 17-24), delivered a separate dissenting opinion.

NATHANIEL R. JONES, Circuit Judge. Defendant Guy Jerome Ursery is appealing his conviction and sentence for manufacture of marijuana on several grounds. Because we find that the civil forfeiture judgment followed by a criminal conviction in this case constitute double jeopardy, we reverse the decision of the district court. Because we find this issue to be dispositive, we decline to reach the other issues raised by Ursery in this appeal.

I. Background

In May 1992, the ex-fiancee of Defendant Ursery's son. Heather McPherson, informed the Michigan State Police that Ursery grew marijuana on his property. Based on this information and further investigation by the police, the police obtained a warrant to search the Ursery home. On July 30, 1992, officers executed the warrant and seized 142 marijuana plants growing in six plots from a field to the west of the rural home. While the police initially believed that the field was part of Ursery's property, it was later determined that three of the plots were 25 feet from Ursery's property line and the other three plots were about 150 feet away from the property line. The plants ranged in height from about six inches to two feet. From the Urserv residence, the police obtained an ammunition case with two plastic bags filled with marijuana seeds, two loaded firearms, a box with ten plastic bags containing marijuana seeds, marijuana stems and stalks, and a growlight.

On September 30, 1992, the United States Attorney's office in Detroit instituted a civil forfeiture action against Ursery and his wife. The government brought the action pursuant to 21 U.S.C. § 881(a) (7)² and sought forfeiture of the Ursery residence.

The action was brought before Judge Lawrence Zatkoff of the United States District Court for the Eastern District of Michigan and was placed on the court's civil docket. The government served a seizure warrant for the Ursery residence on Ursery at his residence on October 2, 1992. Judge Zatkoff conducted a scheduling conference on November 9, 1992, and scheduled trial for July 1993. The Urserys and the government entered into a settlement in which the Urserys agreed to pay the government \$13,250.00. A consent judgment was entered on May 24, 1993. The Urserys paid the judgment on June 17, 1993.

During this time, on February 5, 1993, a federal grand jury in the Eastern District of Michigan returned a criminal indictment which charged Ursery with one-count of manufacture of marijuana in violation of 21 U.S.C. § 841(a)(1). Ursery's pretrial motions for an evidentiary hearing and to suppress evidence, for disclosure of informant, and to strike the mandatory minimum sentence provision were denied following argument on June 16, 1993. The case was originally assigned to Judge Stewart A. Newblatt, but was reassigned to Judge Avery Cohn for trial. Jury trial commenced on June 30, 1993 and the jury returned a guilty verdict on July 2, 1993. Ursery's post-trial motions for a new trial and for dismissal on double jeopardy grounds were denied

¹ McPherson was Brian Ursery's girlfriend and later fiancee from September 1989 to February 1992.

² This section provides the following:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the com-

mission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

²¹ U.S.C. § 881 (a) (7) (1988).

on September 13, 1993. On January 19, 1994, Judge Cohn sentenced Ursery to 63 months imprisonment and four years of supervised release. On March 21, 1994, Judge Cohn granted Ursery's request for bond pending appeal.

II. Discussion

Ursery argues that his criminal prosecution and punishment after settlement of a civil forfeiture proceeding based on the same conduct violated the Double Jeopardy Clause of the Fifth Amendment. This court reviews de novo the constitutional issue of double jeopardy. Costo v. United States, 904 F.2d 344, 346 (6th Cir. 1990).

A. No Waiver

We address first, however, the government's argument that Ursery has waived his claim of double jeopardy. Ursery first raised his claim of double jeopardy in a post-trial Motion for Dismissal. The government argues that Federal Rule of Criminal Procedure 12 requires that motions which object to the institution of the proceedings must be raised prior to trial or they are waived. See Fed. R. Crim. P. 12 also explicitly states that "the court for cause shown may grant relief from the waiver." See Fed. R. Crim. P. 12(f).

Our response to the government's argument is twofold. First, we note that although the government raised this issue of waiver below, the district court did not deem Ursery's double jeopardy argument waived, but addressed the merits of the issue. As such, we are entitled to review this as an issue that was passed upon below. Second, we find that Ursery has shown cause for not raising the Double Jeopardy issue prior to trial in indicating that the Supreme Court's decision in Austin v. United States, 113 S. Ct. 2801 (1993), which clarified its position that any civil forfeiture under 21 U.S.C. § 881(a) (7) constitutes punishment, was decided on June 28, 1993, a mere two days before Ursery's criminal trial commenced. Thus, we find that Ursery did not waive his double jeopardy claim, and we turn to the merits of his claim.

B. Protection of the Double Jeopardy Clause

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 440 (1989). As the Ninth Circuit has recently noted, "at its most fundamental level [the Double Jeopardy Clause] protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." United States v. \$405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994). To decide whether the government has violated Ursery's constitutional right this court must make three key determinations: (1) whether the civil forfeiture in the instant case constitutes "punishment" for

³ Even if the district court had not addressed the merits of this issue, we still would be entitled to reach this issue where we find that "'injustice might otherwise result.'" See Singletm v. Wulff, 428 U.S. 106, 121 (1976) (quoting Hormel v. Helvering, 312 U.S. 552, 557 (1941)).

double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for the same offense; and (3) whether the civil forfeiture and criminal prosecution are separate proceedings. Because we find the answer to each of these questions to be in the affirmative, we hold that Ursery's criminal conviction is a second punishment that violates the Double Jeopardy Clause.

The district court denied Ursery's motion for dismissal on double jeopardy grounds stating the fol-

lowing:

The forfeiture proceeding was settled by a consent judgment. That is not an adjudication. Furthermore, the forfeiture proceeding and criminal conviction were "part of a single, coordinated prosecution of [a] person[] involved in alleged criminal activity." United States v. Millan, [2 F.3d 17, 20] (2d Cir. 1993).

J.A. at 29-30. For the reasons that follow, we reverse this holding of the district court.

C. Jeopardy Attached

Before addressing the three key questions of the double jeopardy analysis outlined above, we note our first disagreement with the district court: the fact that the civil forfeiture proceeding was settled by a consent judgment does not preclude a double jeopardy analysis here. The consent judgment in the forfeiture proceeding was an adjudication for double jeopardy purposes because jeopardy attached when the judgment of forfeiture was entered against Ursery.

Ursery's consent judgment in his civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case. Although in jury trials, jeopardy attaches when the jury is sworn,

Crist v. Bretz, 437 U.S. 28, 38 (1978), and in nonjury trials jeopardy attaches "when the court begins to hear evidence," Serfass v. United States, 420 U.S. 377, 388 (1975), jeopardy attaches to a guilty plea pursuant to a plea agreement upon the court's acceptance of the plea agreement. United States v. Smith, 912 F.2d 322, 324 (9th Cir. 1990); United States v. Kim, 884 F.2d 189, 191 (5th Cir. 1989): Fransaw v. Lynaugh, 810 F.2d 518, 523 & n.9 (5th Cir.) (collecting cases), cert. denied, 483 U.S. 1008 (1987); United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983). The fact that there has been no trial in which a jury is sworn or the court hears evidence does not preclude jeopardy from attaching to a plea entered pursuant to a plea agreement. Similarly, the fact that there has been no trial in a civil forfeiture proceeding does not preclude the attachment of jeopardy to a forfeiture judgment. Jeopardy attaches in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture and enters the judgment of forfeiture. See United States v. Tamez, - F. Supp. -, 1995 WL 139362, at *8 (E.D. Wash. March 13, 1995) (holding that jeopardy attached to stipulated civil forfeiture when court entered the decree of forfeiture).

Nor does the Seventh Circuit's holding in *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994), support the argument that jeopardy did not attach to the judgment of forfeiture in the instant case. In *Torres* the Seventh Circuit held the following:

Torres received notice inviting him to make a claim in the civil forfeiture proceeding. He did not. As a result, he did not become a party to the forfeiture. There was no trial; the \$60,000 was forfeited without opposition, and jeopardy did not attach. You can't have double jeopardy without a former jeopardy. Serfass v. United States, 420 U.S. 377, 389, 95 S.Ct. 1055, 1063, 43 L.Ed.2d 265 (1975). As a non-party, Torres was not at risk in the forfeiture proceeding, and "[w]ithout risk of a determination of guilty, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." Id. at 391-92, 95 S.Ct. at 1064.

28 F.3d at 1465. Torres does not stand for the proposition that jeopardy does not attach to a civil forfeiture when there is no trial; it stands for the proposition that jeopardy does not attach to a civil forfeiture when the party claiming double jeopardy was not a party to the forfeiture proceeding, and thus was never at risk of having a forfeiture judgment entered against him. See United States v. Shorb, 876 F. Supp. 1183, 1187 n.4 (D. Or. 1995) ("As the law now stands, a criminal defendant who asserts a property claim in a forfeiture proceeding plainly does so under a threat of jeopardy."). See also United States v. Walsh, 873 F. Supp. 334, 336-7 (D. Ariz. 1994) (citing Torres for proposition that jeopardy did not attach to forfeiture proceeding where defendant did not make any claim in civil forfeiture proceeding); United States v. Branum, 872 F. Supp. 801, 803 (D. Or. 1994) (same); United States v. Kemmish, 869 F. Supp. 803, 805-06 (S.D. Cal. 1994) (same).

In the instant case, Ursery, unlike Torres, Walsh, Branum, or Kemmish, did make a claim in the forfeiture proceeding, and actively pursued that claim.

Not only was Ursery at risk of a forfeiture judgment, he actually suffered forfeiture. Consequently, jeopardy attached when the forfeiture judgment was entered against Ursery.

D. Double Jeopardy Analysis

1. Punishment

In Halper, the Supreme Court considered whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis. 490 U.S. at 436. In Halper, the defendant was first criminally prosecuted for 65 counts of making false medical reimbursement claims totalling approximately \$585. He was convicted and sentenced to two years imprisonment and fined \$5,000. Subsequently, the government brought a civil action which potentially subjected Halper to a civil penalty of \$130,000 for the false claims. The Supreme Court determined that a particular civil penalty could be "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" in spite of its civil label. 490 U.S. at 442. The Court stated the following:

The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to

serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either rebutive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 447-49 (citations omitted) (emphasis added). This case provides the foundation for the instant determination.

In 1993 the Supreme Court decided Austin v. United States, 113 S. Ct. 2801, in which it held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7). The Court found that civil forfeitures under §§ 881(a)(4) and (a)(7) were punishment because, under the rationale in Halper, these penalties did not serve solely a remedial purpose. 113 S. Ct. at 2812. Specifically, after careful review, the Court made the following declaration:

In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881 (a) (4) and (a) (7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a) (4) and (a) (7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," Browning-Ferris [Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257] 265 [(1989)], 109 S. Ct. at 2915....

Id. (footnote omitted). Thus, under Halper and Austin, any civil forfeiture under § 21 U.S.C. § 881 (a) (7) constitutes punishment for double jeopardy purposes. Cf. United States v. \$405,089.23 U.S. Currency, 33 F.3d at 1219-22 (holding that civil forfeiture under § 881(a) (6) constitutes punishment for double jeopardy purposes because Austin "resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause").

2. Same Offense

The Double Jeopardy Clause protects the accused from multiple punishments in multiple proceedings for the same offense. Under United States v. Dixon, 113 S. Ct. 2849 (1993) and Blockburger v. United States, 284 U.S. 299 (1932), the test for whether two offenses constitute the "same offense" is whether "each offense contains an element not contained in the other." Dixon, 113 S. Ct. at 2856.

The government argues that the civil forfeiture and criminal conviction here do not constitute punishment for the same offense because the criminal prosecution requires proof that a *person*, the defendant, committed the crime, while the forfeiture requires proof that the *property* subject to forfeiture has been involved in the commission of a criminal violation. Thus each offense requires an element that the other does not. We disagree with this analysis.

We find that the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense. The forfeiture applies to "[a]ll real property ... which is used ... to commit or to facilitate ... a violation of this subchapter." 21 U.S.C. § 881(a) (7). Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery's residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action. See Oakes v. United States, 872 F. Supp. 817, 824 (E.D. Wash, 1994) (reaching this very conclusion)4; see also United States v. Tilley, 18 F.3d 295, 297-98 (5th Cir.) ("[I]f the prior civil forfeiture proceeding, which was predicated on the

872 F. Supp. at 824.

same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial."), cert. denied, 115 S. Ct. 574 (1994); United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 495 (9th Cir. 1994) ("[U]nless the civil forfeiture under § 881(a)(4) can be predicated upon some offense other than those for which McCullogh has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause.").

3. Separate Proceedings

The Supreme Court has made clear that the government may "seek[] and obtain[] both the full civil

⁴ The court declared the following:

Any forfeiture under section 881(a) (7), therefore, requires a preceding violation of the controlled substance statutes. Thus, the Government could not have attempted to take Mr. Oakes's home had Mr. Oakes not manufactured marijuana on the premises. To accept the Government's argument that the sections involve different elements simply because one section of the statute deals with property and the other people, would be to adopt a circular and illusory theory.

⁵ The fact that the government did not have to prove that Ursery manufactured marijuana to obtain the consent judgment in the instant case does not alter the nature of the same offense test. As with a plea of nolo contendere, the double jeopardy bar is triggered not by the evidence proved, but by the elements charged. Cf. Brown v. Foltz, 583 F. Supp. 1063, 1069 (E.D. Mich.) (holding that plaintiff was placed in double jeopardy when he pled nolo contendere to simple larceny and was subsequently convicted of armed robbery since under Michigan law larceny was a lesser-included offense of armed robbery and the convictions arose out of same transaction). aff'd, 754 F.2d 372 (6th Cir. 1984); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989) (stating that nolo contendere plea furnishes sufficient basis for double jeopardy claim); Chikitus v. Shands, 373 So.2d 904, 905 (Fla. 1979) (holding that plaintiff's double jeopardy claim based on his prior nolo contendere plea was not barred because relevant consideration is not nature of evidence adduced at prior trial, but elements of previous crime charged); State v. Gobern, 423 A.2d 1177, 1179 (R.I. 1981) (holding that once nolo contendere plea is accepted by court, jeopardy attaches).

penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Halper, 490 U.S. at 450 (emphasis added). There is disagreement among the circuits, however, as to when a civil forfeiture action and criminal prosecution can properly be considered components of a single proceeding so that double jeopardy is not triggered. We find that the facts in this case simply do not support a determination that the civil forfeiture and criminal prosecution constituted such a single proceeding.

In United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), the Second Circuit concluded that a civil forfeiture suit and criminal prosecution constituted a single proceeding that did not implicate double jeopardy concerns. In reaching this conclusion the court stated the follow-

ing:

In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the Stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the [Defendants] were aware of the criminal charges against them when they entered into the Stipulation. Given these circumstances, we reach the conclusion that the civil and criminal actions were but different prongs of a single prosecution of the [Defendants] by the government.

2 F.3d at 20. Comparing this statement to the facts of the instant case, the only similarity is that Ursery

was aware of the criminal charges against him at the time he settled the civil forfeiture suit. This similarity is insufficient to warrant application of *Mil*lan's holding to the instant case.

In contrast, the Ninth Circuit has rejected the

Millan view:

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."

\$405,089.23 U.S. Currency, 33 F.3d at 1216. The court found that the parallel proceedings in that case were separate proceedings for double jeopardy purposes. Id. at 1218.

The government argues that the fact that the civil forfeiture action and criminal action were commenced roughly four months apart should not deter application of Millan, and points to the Eleventh Circuit's recent decision, United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994), in which the court found a single proceeding even though the civil forfeiture action and criminal action began and ended on different dates. The government points to the Eleventh Circuit's explanation that, "[a]s in Millan, there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action." 13 F.3d at 1499. We do not find this rationale to be dispositive of the issue.

The Ninth Circuit's rationale in \$405,089.23 U.S. Currency suggests that parallel civil forfeiture and

criminal proceedings will always violate the Double Jeopardy Clause. See 33 F.3d at 1216 ("A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time.") (emphasis in original). The Ninth Circuit completely rejects the Second and Eleventh Circuit's efforts to consider the parallel proceedings as one prosecution. See id. at 1217 ("We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution."). While we acknowledge the Ninth Circuit's approach, we also find it unnecessary to fully adopt the Ninth Circuit's view in this case. It is merely our view that in so far as the existence of a "single, coordinated proceeding" could arguably satisfy the requirements of the Double Jeopardy Clause, as suggested by the Second and Eleventh Circuits, the facts in this case fail to reveal such a single, coordinated proceeding. In the instant case, the record reveals no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution as a coordinated proceeding. Moreover, as government counsel made clear at oral argument, there has been no communication between the government attorneys who handled Ursery's criminal prosecution and those who handled the civil forfeiture action. The civil forfeiture proceeding and the criminal proceeding were instituted four months apart, presided over by different district judges, and resolved by separate judgments. The district court found these two proceedings to be part of a "single, coordinated proceeding" without providing any factual support for this determination. As a matter of principle, applying a label to something does not

make it so. Without a reasonable analysis of the indicia of coordination, we do not believe these two proceedings logically become part of a single, coordinated procedure merely by labeling them as such. Similar to the Ninth Circuit, we find that applying the label of "single, coordinated prosecution" to the facts of this case simply goes too far. The civil forfeiture proceeding and the criminal prosecution were two separate proceedings for purposes of double jeopardy analysis.

"[the State] no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or indeed, if it had assessed the tax in the same proceeding that had resulted in his conviction. Here, we ask only whether the tax had punitive characteristics that subject it to the constraints of the Double Jeopardy Clause."

Id. at 1945 (citations omitted) (emphasis added). In Kurth Ranch, the Court found that the tax proceeding, initiated after the taxpayer's arrest for conduct giving rise to the tax obligation, constituted a successive proceeding to the taxpayer's criminal proceeding. Id. at 1947 n.21. The Court did not consider whether the contemporaneous criminal prosecution and tax proceeding could be viewed as a "single, coordinated proceeding" for purposes of double jeopardy analysis. See Torres, 28 F.3d at 1465 (noting the same in dicta). Instead, the Court found that the State's assessment of the tax in a proceeding separate from the taxpayer's criminal prosecution necessarily constituted separate proceedings

Nor does the Supreme Court's recent holding in Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) alter this conclusion. In Kurth Ranch, the Court examined "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." 114 S. Ct. at 1941. In beginning its analysis, the Court explained that

III. Conclusion

For the reasons stated above, we find that the civil forfeiture judgment against Ursery followed by his criminal conviction constituted double jeopardy. Consequently, we reverse the judgment of the district court, and we remand the case to that court with instructions to reverse Ursery's conviction and vacate his sentence.

for the purpose of double jeopardy analysis. This holding, to the extent that it is applicable to the instant case, is in accord with our view that the civil forfeiture proceeding and the criminal prosecution in the instant case were two separate proceedings for purposes of double jeopardy analysis.

Finally, we note that, contrary to the dissent's suggestion, the fact that the Court did not address the civil forfeiture proceeding which also existed in *Kurth Ranch* simply has no precedential value in this case.

MILBURN, Circuit Judge, dissenting. The majority holds that the civil forfeiture judgment followed by a criminal prosecution in this case violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. I respectfully dissent.

Defendant argues that the imposition of criminal punishment against him, in addition to the civil forfeiture proceedings instituted against his home, is prohibited by the Double Jeopardy Clause. However, in its memorandum and order issued on September 14, 1993, the district court denied defendant's motion to dismiss on double jeopardy grounds, finding that the civil forfeiture proceeding and the criminal conviction were "part of a single, coordinated prosecution of [a] person involved in alleged criminal activity," J.A. 29-30, and that such an effort did not violate the Double Jeopardy Clause. For the reasons that follow, I would affirm this holding of the district court.

T

In United States v. Halper, the Supreme Court held that a civil sanction, when applied against an individual also subject to criminal conviction, may constitute "punishment" that requires a double jeopardy analysis. United States v. Halper, 490 U.S. 435, 448 (1989). However, the Court indicated that its decision was not intended to "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Halper, 490 U.S. at 450-51. Thus, the Double Jeopardy Clause offers protection when the government has already imposed a penalty, either civil or criminal, and

seeks to impose further punishment out of dissatisfaction with the earlier result, id. at 451 n.10, but not in the instance of a single proceeding seeking the full range of available sanctions. See also United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994) (citing United States v. Bizzel, 921 F.2d 263, 267 (10th Cir. 1990)) (finding that the order of penalties is not material to the double jeopardy question). The Court recently reaffirmed this principle in Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994).

Unlike the majority, I believe that this case involves a sufficiently coordinated proceeding to fall under the holdings in United States v. Millan, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), and United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, 13 F.3d 1493 (11th Cir. 1994). In Millan, the Second Circuit found that the civil forfeiture action against defendant's bank accounts and certain properties and his conviction on narcotics charges were not subject to double jeopardy analysis because the government's actions were part of a "single, coordinated prosecution of persons involved in alleged criminal activity." Millan, 2 F.3d at 20. It is true, as the majority points out, that Millan involved a much clearer case of coordinated proceedings. However, the Second Circuit's concern in that case, and

its focus, was whether the timing of the civil and criminal actions allowed the government to punish the defendant with a second action if it believed that the defendant had not received a sanction that was adequately severe in the first case. The Second Circuit stated that its decision did not run afoul of the Supreme Court's concern in Halper that the government might abuse its resources by seeking to punish defendants a second time because the civil and criminal actions at issue were contemporaneous, and it was clear to all the parties that the government was pursuing the full range of its remedies regardless of the outcome in either the civil or criminal proceedings. Millan, 2 F.3d at 20-21. This was also the logic of the Eleventh Circuit in One Single Family Residence, in which the court found that "the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution." One Single Family Residence, 13 F.3d at 1499.2 It is this logic that underlies my conclusion that there was no double jeopardy violation in this case.

¹ In Kurth Ranch, the Court noted that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction." Kurth Ranch, 114 S. Ct. at 1945 (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)).

² In One Single Family Residence, a civil forfeiture action was instituted against the home of the defendant in October 1990; five months later, in late March 1991, an indictment was returned against the defendant. The government pursued both remedies, obtaining a conviction on October 30, 1991, and a subsequent order of forfeiture. The Eleventh Circuit noted, as the Second Circuit had in Millan, that the case involved no potential for the government to seek a second punishment out of dissatisfaction with the outcome in the first action because the commencement of a civil action before the imposition of a criminal penalty precluded such a result. One Single Family Residence, 13 F.3d at 1499 (citing Millan, 2 F.3d at 20).

I believe that the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings are the central factors in assessing the double jeopardy concerns in this case. Such an approach avoids the inevitable difficulty of a caseby-case comparison of the level of coordination, the majority's method for making this determination. Merely looking at whether the proceedings at issue bear sufficient similarity to the proceedings in Millan presents the difficult problem of determining how much similarity it required to permit a finding of a single, coordinated proceeding. For example, in this case, the proceedings against defendant and his property took place in close time proximity to one another. The government commenced civil forfeiture proceedings against the home owned by defendant and his wife on September 30, 1992, and a grand jury returned an indictment against defendant on February 5, 1993. Pursuant to a stipulated settlement agreement, the district court entered a consent judgment in the civil forfeiture proceeding on May 24, 1993. Defendant was convicted on the criminal charge on July 2, 1993. It was clear to defendant at the time he entered into the stipulated settlement agreement that the government was pursuing its full range of remedies against him. Is this enough factual similarity to apply Millan and One Single Family Residence? The majority concludes that it is not, but another panel could easily reach a contrary conclusion. Given the inherent problems in following such an unpredictable approach, I feel it is necessary to determine the case on a more objective and reliable basis. I conclude that this case involves a single, coordinated proceeding because it does not present the potential for government abuse of process; the government instituted and pursued both proceedings against defendant before it knew the outcome of either case.

It is true, as the majority points out, that the civil and criminal proceedings against defendant were handled by separate counsel from the United States Attorney's office and that the government attorneys did not appear to be actively collaborating. However, in Millan, the Second Circuit observed that the fact of separate proceedings is not dispositive in determining whether the government is employing a single proceeding to prosecute a defendant. "Civil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." Millan, 2 F.3d at 20. In this case, the civil and criminal proceedings against defendant and his property were active during the same time frame, and defendant knew at the time of the settlement in the civil forfeiture action that a criminal action was pending. Moreover, both actions resulted from a search of defendant's property and the surrounding areas, a search that revealed extensive marijuana production and possession.

In United States v. Torres, 28 F.3d 1463, 1464-65 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994), the Seventh Circuit questioned the continued applicability of Millan and One Single Family Residence after the Supreme Court's recent decision in Kurth Ranch. However, I do not believe that Kurth Ranch necessarily changes this result. Kurth Ranch does not hold that every civil action the government pursues against

a defendant subject to other penalties constitutes a separate proceeding. In fact, Kurth Ranch itself included a criminal penalty, a civil forfeiture action, a bankruptcy action, and a tax assessment. Kurth Ranch, 114 S. Ct. at 1941-44. There was apparently no challenge to the simultaneous pursuit of a criminal action and a civil forfeiture proceeding, the case we are dealing with here. Moreover, the Court, by its own language, distinguished Kurth Ranch, noting that the tax statute at issue did not raise "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Kurth Ranch, 114 S. Ct. at 1947 n.21.

The Court's primary focus in Kurth Ranch was on the issue of whether Montana's drug tax constituted a penalty for double jeopardy purposes. The Court never questioned the civil forfeiture action but dealt specifically and exclusively with the tax assessment. The language of the decision suggests that the Court viewed the case as different from other civil actions because it was based on a tax issue. The Court said: "[T]he tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." Kurth Ranch, 114 S. Ct. at 1947. Thus, in Torres, the Seventh Circuit interperted Kurth Ranch as dealing with the collection of a monetary penalty for a crime. Torres, 28 F.3d at 1464-65. The Montana tax could be imposed only after a criminal conviction was obtained. There was no question that the same conduct was involved. That is not the case here. Defendant did not have to be convicted of the drug offense before a civil forfeiture could be pursued. In fact, the civil proceedings were begun first. Therefore, I conclude that neither the civil forfeiture nor the criminal conviction was imposed as punishment consequent upon defendant's criminal conviction or admission of guilt.

Because I conclude that the government was not acting to pursue a second punishment out of dissatisfaction with the first outcome, the only remaining concern is whether the "total punishment exceed[s] that authorized by the legislature." Halper, 490 U.S. at 450. Defendant was convicted of violating 21 U.S.C. § 841(a)(1). Under 21 U.S.C. § 841(b)(1)(B)(vii), defendant was subject to a term of imprisonment of not less than five years, nor more than 40 years; a fine not to exceed \$2,000,000; and a term of supervised release of at least four years. Defendant was sentenced to 63 months imprisonment and four years of supervised release. No fine was imposed. Thus, defendant's sentence was clearly within the range of authorized punishment.

In addition, pursuant to 21 U.S.C. § 881(a)(7), any real property that is used or intended to be used to facilitate the commission of a violation of 21 U.S.C. § 801 et seq. that is punishable by more than one year in prison is subject to forfeiture unless the owner qualifies as an "innocent owner." Marijuana stems and seeds were found in defendant's home during the search of his property; furthermore, the police received notice that defendant had been seen with marijuana at his home and had shared marijuana with family members and acquaintances. Defendant's home was, therefore, properly subject to civil for-

faiture under 21 U.S.C. § 881(a)(7), a civil penalty well within the bounds set forth by Congress.

II.

A

I also note my disagreement with the majority's conclusion that the civil forfeiture action and defendant's criminal prosecution are based on the same offense. The majority concludes that the civil forfeiture necessarily requires proof that defendant was manufacturing marijuana, and the criminal offense is effectively subsumed by the forfeiture. Again, I disagree.

In the criminal prosecution in this case, defendant was convicted on one count of manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1). For defendant to be found guilty under this statute, the prosecution had to show (1) that defendant manufactured marijuana and (2) that he did so intentionally or knowingly. See United States v. Litteral, 910 F.2d 547, 550 (9th Cir. 1990) (requiring the same elements to prove a charge of manufacturing methamphetamine). However, defendant was charged with the manufacture of marijuana only during the year 1992.

By contrast, the civil forfeiture complaint charged that defendant's property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance for several years. J.A. 19. In order to prevail in the civil forfeiture action, the government would have to have produced proof of probable cause to believe (1) that the property was used or intended to be used to facilitate the manufacture and distribution of marijuana and (2) that this offense was punishable under Title 21 of the

United States Code by imprisonment of more than one year. 21 U.S.C. § 881(a)(7); United States v. Real Property Known and Numbered as Rural Route 1, Box 137-B, Cutler, Ohio, 24 F.2d 845, 848 (6th Cir. 1994). The majority claims that the government could not confiscate defendant's residence without a showing that he was manufacturing marijuana. This view, however, overlooks the fact that the civil forfeiture action required a showing that defendant's property was involved in the commission or facilitation of both processing and distribution of a controlled substance over the course of several years. As earlier stated, the criminal indictment charged defendant only with the manufacture of a controlled substance during 1992. Had the civil forfeiture action been adjudicated, the government might have established its case with evidence relating solely to processing and distribution activities in years other than 1992. Under those circumstances, the criminal prosecution and the civil forfeiture action would undoubtedly relate to separate offenses under the Double Jeopardy Clause. United States v. Miller, 870 F.2d 1067, 1069-72 (6th Cir. 1989).

III.

For the reasons stated, I would hold that the civil forfeiture action against defendant's property followed by decendant's criminal prosecution did not create a double jeopardy violation, and I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil No. 92 CV 75943 DT

Honorable Lawrence Zatkoff
UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVMENTS AND APPURTENANCES, DEFENDANT.

COMPLAINT FOR FORFEITURE

NOW COMES the United States of America, Plaintiff, STEPHAN J. MARKMAN, United States Attorney, by and through JOYCE F. TODD, Assistant United States Attorney, and states in support of this Complaint for forfeiture in rem that:

1) This action is a civil action in rem brought to enforce the provision of 21 U.S.C. § 881(a)(7) for the forfeiture of real property which was used or intended to be used to facilitate the commission of a violation of Title 21, United States Code, Section 801 et seq. punishable by more than one year's imprisonment.

2) This Court has jurisdiction to hear this action pursuant to 28 U.S.C. § 1324, 1355, 1356, 1395, and 21 U.S.C. § 881(a) (7).

3) That the defendant real property with building, appurtenances, and improvements is legally described

as follows:

Part of the West ½ of the Northeast ¼ of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North ¼ corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minuts 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

and is commonly known as CERTAIN REAL PROP-ERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IM-PROVEMENTS AND APPURTENANCES.

4) Said property is currently titled in the name of

Guy J. Ursery and Cynthia K. Ursery.

5) For several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance and is forfeitable under 21 U.S.C. § 881(a) (7), all as more fully set forth in the affidavit in support of seizure warrant issued by Magistrate Judge Virginia Morgan on September 30, 1992, and

assigned Miscellaneous Action No. 92 X 75843. Said seizure warrant, along with each and every allegation set forth in its supportive affidavit, are adopted and incorporated into the body of this Complaint by reference as if the same were fully and completely herein

set forth as Appendix A.

WHEREFORE, the United States of America prays that a warrant for arrest of the defendant CERTAIN REAL PROPERTY LOCATED AT 1700 ROAD, PERRY, SHIAWASSEE BRADEN COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND AP-PURTENANCES; that due notice be given to all parties to appear and show cause why the forfeiture should not be decreed; that judgment be entered declaring the defendant property to be condemned and forfeited to the United States of America for disposition according to law; and that the United States of America be granted such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Respectfully submitted.

STEPHEN J. MARKMAN United States Attorney

/s/ Joyce F. Todd JOYCE F. TODD (P 31026) Assistant U.S. Attorney 817 Federal Building 231 W. Lafayete Detroit, MI 48226 (313) 237-4775

VERIFICATION

I. DAVID J. PORTELLI, state that I am an Assistant United States Attorney for the Eastern District of Michigan. I have read the foregoing Complaint for Forfeiture and asserts that the facts contained therein are true to the best of my knowledge and belief, based on information officially presented to me by agents of the Drug Enforcement Administration.

> /s/ David J. Portelli DAVID J. PORTELLI

Dated: September 25, 1992

VERIFICATION

I, CHRISTOPHER J. HACKBARTH, am a Special Agent of the Drug Enforcement Administration. I have read the foregoing Complaint for Forfeiture and assert that the facts contained therein are true to the best of my knowledge and belief, based upon knowledge possessed by me and/or on information received from other law enforcement agents.

/s/ CHRISTOPHER J. HACKBARTH

Dated: September 25, 1992

APPENDIX C

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil No. 92 CV 75843 DT Honorable Lawrence Zatkoff

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES, DEFENDANT.

STIPULATION FOR ENTRY OF CONSENT JUDGMENT OF FORFEITURE

NOW COMES the Plaintiff, UNITED STATES OF AMERICA, STEPHEN J. MARKMAN, United States Attorney, by JOYCE F. TODD, Assistant United States Attorney; and claimants, GUY URSERY and CYNTHIA URSERY, by and through their attorney, LAWRENCE J. EMERY, and make the following stipulation:

- 1) This action is a civil in rem controlled substance forfeiture action brought pursuant to Title 21 USC § 881(a)(7).
- 2) This stipulation is submitted to resolve this action in its entirety.

- 3) The above parties, being aware of their rights in this matter hereby stipulate and agree as follows:
 - (a) Claimants, Guy Ursery and Cynthia Ursery, agree to pay \$13,250.00 to the United States of America in full settlement of all claims of the United States against the real property located at 1700 BRADEN ROAD, PERRY, SHIAWAS-SEE COUNTY, MICHIGAN, more fully described as:

Part of the West 1/2 of the Northeast 1/4 of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North 1/4 corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet: thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called:

- (b) Upon the such payment being made, the Lis Pendens that has been filed with the Shiawassee County Register of Deeds will be discharged by the United States of America.
- (c) If the payment in full is not received by the United States on or before 60 days of the entry date of this judgment, the defendant property will

automatically be forfeited to the United States of America.

(d) The claimants, for purposes of this settlement only, do not contest that as provided in Title 28 USC § 2465, the United States and or its agents had reasonable cause for the seizure of defendant property.

Approved as to substance and form:

/s/ Joyce F. Todd Joyce F. Todd (P31026) Assistant U.S. Attorney 231 W. Lafayette, 9th Floor Detroit, MI 48226 (313) 237-4775 Dated: 5-20-93 /s/ Lawrence J. Emery
Lawrence J. Emery
(P23263)
Attorney for Claimants
GUY URSERY
CYNTHIA URSERY
3401 E. Saginaw, Suite 104
Lansing, MI 48912
(517) 337-4866

Dated: 5-17-93

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

> Civil No. 92 CV 75843 DT Honorable Lawrence Zatkoff

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES, DEFENDANT.

CONSENT JUDGMENT OF FORFEITURE

This matter having come before this Court pursuant to the Stipulation For Entry of Judgment entered into between the claimants, GUY URSERY and CYNTHIA URSERY, and the Plaintiff, UNITED STATES OF AMERICA. This Court, having reviewed that Stipulation, the other pleadings filed in this action, and being aware of the law applicable to this action;

IT IS HEREBY ORDERED THAT the claimants, Guy Ursery and Cynthia Ursery, shall pay \$13,250.00 to the United States of America, within 60 days of the entry of this judgment;

IT IS FURTHER ORDERED THAT upon such payment being received, the real property, commonly known as 1700 BRADEN ROAD, PERRY, SHIA-WASSEE COUNTY, MICHIGAN, being more fully described as:

Part of the West ½ of the Northeast ¼ of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North ¼ corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

shall be released from all claims of the United States of America.

IT IS FURTHER ORDERED that if the payment in full is not received by the United States on or before 60 days of the entry date of this judgment, the defendant property will automatically be forfeited to the United States of America.

IT IS FURTHER ORDERED THAT the parties further stipulate that the claimants, for purpose of this settlement only, do not contest that as provided in Tile 28 USC § 2465, the United States and or its

agents had reasonable cause for the seizure of defendant property.

/s/ Lawrence Zatkoff
Lawrence Zatkoff
United States District Judge

Entered: May 24, 1993

Approved as to substance and form:

/s/ Joyce F. Todd Joyce F. Todd (P31026) Assistant U.S. Attorney 231 W. Lafayette, 9th Floor Detroit, MI 48226 (313) 237-4775 Dated: 5-20-93

/s/ Lawrence J. Emery
Lawrence J. Emery
(P23263)
Attorney for Claimants
GUY URSERY
CYNTHIA URSERY
3401 E. Saginaw, Suite 104
Lansing, MI 48912
(517) 337-4866
Dated: 5-17-93

APPENDIX E

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Criminal No. 93-50016

UNITED STATES OF AMERICA, PLAINTIFF

v.

GUY JEROME URSERY, DEFENDANT

MEMORANDUM AND ORDER

I.

On July 2, 1993 a jury found defendant guilty of a violation of 21 U.S.C. § 841(a)(1), manufacture of marijuana. More particularly, the jury found defendant was growing a substantial number of marijuana plants in a heavily wooded area in close proximity to his home in rural Shiawasee County, Michigan. The offense was investigated by the Michigan State Police; there was no federal involvement other than at the prosecution stage. Defendant has yet to be sentenced.

Now before the Court are defendant's motion for a new trial and motion to dismiss. The motion to dismiss argues that the conviction constitutes double jeopardy, as a result of the civil forfeiture proceeding instituted and concluded in favor of the government before his conviction in this case. The motion to dismiss is DENIED. The forfeiture proceeding was settled by a consent judgment. That is not an adjudication. Furthermore, the forfeiture proceeding and criminal conviction were "part of a single, coordinated prosecution of [a] person involved in alleged criminal activity." *United States v. Millan*, 1993 U.S. App. LEXIS 20165 (2nd Cir. 1993). While the Court is surprised that the Government proceeded with its forfeiture action before obtaining an indictment, it nevertheless recognizes that such a single coordinated prosecution does not give rise to double jeopardy.

The motion for new trial raises four issues:

- Retaliation for refusal to become an informant.
- Violation of due process and equal protection because of the lack of federal involvement in the investigation and the substantially higher penalties under federal law than under State law.
- Prejudice because of the reference in the testimony to defendant's threatening to use a firearm against police officers and because the prosecutor in closing commented on defendant's not taking the witness stand.
- 4. Invalid search.

Issues 1 and 2 look to dismissal of the prosecution and will be treated as grounds for a judgment of acquittal, Fed. R. Crim. P. 29. Issue 3 looks to a second trial and will be treated as a motion for new trial, Fed. R. Crim. P. 33. Issue 4 was decided pretrial when Judge Stewart Newblatt denied a motion to suppress and will not be re-examined. If Judge Newblatt is wrong, defendant will be entitled to a

new trial in theory, but in practice the case would have to be dismissed. The Court notes, however, that the affidavit in support of the search warrant described the affiant's personal observation of growing marijuana in addition to the information furnished by a reliable informant.

II.

As to arguments regarding the threat of federal prosecution if defendant did not become an informant and the federal prosecution itself, the Sixth Circuit decision in United States v. Allen, 954 F.2d 1160 (6th Cir. 1992), is a short "no" answer. Nothing in the record suggests that the federal prosecutor did other than exercise discretion in taking the case to the grand jury and thereafter obtaining an indictment. Whether good or bad judgment was exhibited is not for the Court to decide. As stated in Allen, 954 F.2d at 1166:

Prosecutors are given great discretion in determining which cases will be prosecuted: "[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute and what charge to file . . . generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 668-69, 54 L.Ed. 2d 604 (1978) (footnote omitted).

The prosecutor may properly base his decision on the penalties available upon conviction when determining what offense will be charged against a defendant. United States v. Batchelder, 442

.

U.S. 114, 125, 99 S.Ct. 2198, 2204-05, 60 L.Ed. 2d 755 (1979).

The claim of prejudice arising from a State Police Officer's testimony that defendant threatened to shoot any police officer who came after him must be rejected. The statement was made in a response to a question about the presence of an excessive number of police officers at the execution of the search warrant. Defendant initially suggested the number was excessive. Defendant was also aware of his statement in advance of trial. The Court effectively told the jury to disregard the testimony of the State Police Officer. Under the circumstances more was not necessary to eliminate any possible prejudice.

The claim of prejudice regarding the prosecutor's final argument must also be rejected. No comment was made on the defendant's failure to testify. There was no dispute that marijuana was being grown in proximity to defendant's home. Defendant suggested the possibility of some third-party's growing the marijuana. In response, the prosecutor pointed out the unlikelihood of defendant's suggestion, since defendant (or for that matter others in the home) more than likely would have seen a stranger tending

the plants.

III.

The motion for judgment of acquittal is DENIED. The motion for new trial is DENIED.

SO ORDERED.

/s/ Avern Cohn AVERN COHN United States District Judge

DATED: Detroit, Michigan Detroit, Michigan

APPENDIX F

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

Case Number: 93-50016

UNITED STATES OF AMERICA

v.

GUY JEROME URSERY

LAWRENCE EMERY Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

alanded milter to count(a)

□ pleaded guil	ty to count(s) -		
not guilty.	uilty on count(s)		
	the defendant is which involve the		
	Nature of Offense	Date Offense	Count
21:USC:841(a)(1)	Manufacture of Marijuana	7/30/92	One
2 through 4 of	this judgment. to the Sentence	The senter	nce is im
	ant has been for t(s).		

Count(s)	- (is)	(are)	dismissed
on the motion of the United			

☑ It is ordered that the defendant shall pay a special assessment of \$50.00, for count(s) One, which shall be due ☑ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 363-64-7660

Defendant's Date of Birth: August 4, 1956

Defendant's Mailing Address:

1700 Braden Road Perry, MI 48872

January 19, 1994

Date of Imposition of Sentence

/s/ Avern Cohn
Signature of Judicial Officer
AVERN COHN, U.S. District Judge
Name & Title of Judicial Officer
January 20, 1994
Date

IMPRISONMENT

. 1 ___ the amount to the metady

of	the United States Bureau isoned for a term of sixty the	of Prisons to be im-	
	The Court makes the follow the Bureau of Prisons:		
	The defendant is remanded United States Marshal.	d to the custody of the	
	The defendant shall sur States Marshal for this dist a.m.		
	□ at — p.m. on —	-	
	☐ as notified by the Marsha	al.	
□ The defendant shall surrender for service of tence at the institution designated by the Foreign of Prisons			
	⊠ before 2 p.m. on Februar	y 24, 1994.	
	as notified by the United	States Marshal.	
	as notified by the Probat	tion Office.	
	RETUR	N.	
	I have executed this Judgme	ent as follows:	
	Defendant delivered on —		
-	, with	a certified copy of this	
Ju	adgment.		
		United States Marshal	
	Ву	Deputy Marshal	

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- □ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☑ The defendant shall not possess a firearm or destructive device.
 - 1. Defendant shall participate in a drug abuse program, if necessary as directed by the Probation Department

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- the defendant shall not leave the judicial district without the permission of the court or probation officer;
- the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptance reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not

- associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

 ∑ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court reduced the Offense Level by 2 points as the Court finds that the firearms found

at defendant's residence should not be added in the Offense Level

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: at least 4 years

Fine Range: \$12,500 to \$2,000,000.00

 ⊠ Fine is waived or is below the guideline range, because of the defendant's inabil-ity to pay.

Restitution: \$ N/A

- ☐ Full restitution is not ordered for the following reason(s):
- □ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

- □ upon motion of the government, as a result of defendant's substantial assistance.
- □ for the following reason(s):

APPENDIX G

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 841 of Title 21, United States Code, provides:

Prohibited acts A

Unlawful acts

- (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates sub-

section (a) of this section shall be sentenced as follows:

- (1) (A) In the case of a violation of subsection (a) of this section involving—
 - (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
 - (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
 - coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
 - (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
 - (iv) 100 grams or more of phencyclidine (PCP or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
 - (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
 - (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-

phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl) propanamide;

- (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
- (viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person com-

mits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

- (B) In the case of a violation of subsection (a) of this section involving—
 - (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
 - (ii) 500 grams or more of a mixture or substance containing a detectable amount of—
 - coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

- (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
- (iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide:

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be

not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,00 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 2 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more

than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5)

of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule VI, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to a narcotic drugs, marihuana, or depressant or stimulant sub-

stances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both.

- (4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.
- (5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—
 - (A) the amount authorized in accordance with this section;
 - (B) the amount authorized in accordance with the provisions of Title 18;
 - (C) \$500,000 if the defendant is an individual; or
 - (D) \$1,000,000 if the defendant is other than an individual;

or both.

- (6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—
 - (A) creates a serious hazard to humans, wildlife, or domestic animals,
 - (B) degrades or harms the environment or natural resources, or
 - (C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18, or imprisonment not more than five years, or both.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a) (2), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

- (d) Any person who knowingly or intentionally-
 - (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;
 - (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
 - (3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of his title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property; penalties; definitions

(e) (1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than \$10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20

years and shall be fined not more than \$20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or impercation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

- (g) (1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.
 - (2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is

acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

Section 881 of Title 21, United States Code provides:

Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired

in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in

paragraph (1), (2), or (9).

- (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that-
 - (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section

unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, ex-

cept that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, posses-

sion, or concealment of property described in paragraph (1) and (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

- (c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—
 - (1) place the property under seal;
 - (2) remove the property to a place designated by him; or
 - (3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provision hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of

property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

- (e) (1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—
 - (A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;
 - (B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;
 - (C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;
 - (D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

- (E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—
 - (i) has been agreed to by the Secretary of State:
 - (ii) is authorized in an international agreement between the United States and the foreign country; and
 - (iii) is made to a country which, if applicable, has been certified under section 2291(j)(b) of Title 22.
- (2) (A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—
 - (i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and
 - (ii) awards of up to \$100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of

such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforce-

ment agency under paragraph (1)(A)-

- (A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and
- (B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.
- (4) (A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority etsablished in paragraph (1) (B).
- (B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may trans-

fer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

Forfeiture and destruction of schedule I or II substances

If that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a) (2) of this section; and any equipment or container subject to forfeiture under subsection (a) (2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

- (g) (1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growth, may be seized and summarily forfeited to the United States.
- (2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(f) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter

or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the crimnal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(1) The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.



Supreme Court, U.S. F I L E D SEP 25 1995

CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

File No. 95-345

GUY JEROME URSERY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE J. EMERY Attorney for Respondent 3401 E. Saginaw, Suite 104 Lansing, MI 48912 (517) 337-4866

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Guy Jerome Ursery, opposes the petition for certiorari file by the United States of America with respect to the case of <u>United States</u> v <u>Guy Jerome Ursery</u>, 59 F 3d 568 (CA 6, 1995).

FACTUAL MATTERS

Respondent supplements the factual background with the following information:

- 1. Prior to filing a civil complaint for forfeiture, the United States obtained a Seizure Warrant for Ursery's property (Appendix A) This warrant was based on an Affidavit in Support of Seizure Warrant. (Appendix B) This document made no mention of distribution of a controlled substance. This affidavit outlined evidence that Respondent had been growing (manufacturing) marijuana. The Seizure Warrant was executed by United States Marshals on October 2, 1992, effectively seizing Respondent's real estate without a hearing.
- was used to facilitate "unlawful processing and distribution" of marijuana and purported to incorporate the allegations in the Affidavit in Support of Seizure Warrant, supra. As indicated above, this affidavit contained no allegations of distribution. Moreover, no evidence of commercial distribution was presented at the trial. The only evidence relating to disposition of the marijuana at trial was to the effect that Respondent shared it with his friends and acquaintances without renumeration. (See 59 F 3d

- 568, 579, dissenting opinion of Judge Milburn.) There was no evidence that the Respondent used his residence to facilitate or commit the commercial distribution of marijuana. There was no evidence that the marijuana allegedly grown by the Respondent was shipped across state lines. The Presentence Investigation Report (Appendix C) contained no reference to marijuana distribution and none was alleged or considered as "relevant conduct" under the sentencing guidelines, U.S.S.G §1B1.3. The informant, Heather McPherson, whose disclosures resulted in both the forfeiture and the criminal prosecution claimed to be at the Ursery residence almost everyday during the period of 1990 1992 and never observed marijuana trafficking.
- 3. The primary law enforcement agency investigating this matter was the Michigan State Police. No federal agents were involved as witnesses at Respondent's trial. Federal agents were present when the search warrant issued by a state court magistrate was executed. Under the laws of the State of Michigan, Respondent could have been charged with manufacture of marijuana. Under MCLA 333.7401(2)(c) he would have faced a felony with a maximum punishment of four (4) years imprisonment and/or a fine of \$2,000.00, instead of a penalty of 5 40 years imprisonment with a mandatory 5 year sentence under the federal statute. 21 USC 841(a)(1).
- 4. Respondent and his wife filed an Answer to the Complaint for Forfeiture, contesting, among other things, the allegations that marijuana was found growing on their real estate. In their

answer they referred to a certified survey and private investigator's report that indicated that plots where marijuana plants were seized were outside the boundaries of their property.

5. At all times relevant to this case, the government could have proceeded under the provisions of 21 USC 853, which provides for criminal forfeiture upon the Respondent's conviction for growing marijuana.

REASONS FOR DENYING CERTIORARI

Petitioner cites three reasons for granting certiorari, each of which will be analyzed below.

I.

The government argues that the Sixth Circuit erred in determining that the civil forfeiture in this case was punishment, attacking the claimed categorical approach employed in the resolution of this case. This argument centers on the legal standard and pays no attention to the actual facts of this case. As was the case in <u>United States</u> v <u>Halper</u>, 490 U.S. 435 (1989), the imposition of forfeiture of Ursery's real estate constituted an "overwhelmingly disproportionate" sanction. There was no evidence that Ursery purchased this property with the proceeds of illegal drug trafficking. There was no evidence of commercial trafficking. Ursery had worked for approximately 18 years for General Motors and earned a comfortable and honest living. (Appendix C, p 7) He and his wife had purchased the forfeited home and were obligated on a mortgage in the amount of \$13,512.19. (Appendix C, p 8) The mortgage holder, NBD Bank, was a party to the civil forfeiture

matter. Ursery's financial condition did not suggest that he was an affluent drug dealer. His financial condition was consistent with his station in life and his legitimate employment.

Not only did Ursery have his home forfeited, he faced 5-40 years of imprisonment. The imposition of civil forfeiture in this case served no other purpose other than to impose further punishment. The proceeds from the liquidation of Respondent's residence could not have reimbursed the federal government for the expenses of its investigation as the investigation in this case was conducted by the Michigan State Police. The government presented no evidence regarding the cost of the investigation undertaken by state authorities. There was no evidence that the residence was purchased with illegally gotten gain. The purposes of forfeiture were retributive and deterrent, not remedial, especially when viewed in light of the particularized facts in this case.

The trial judge commented on the disproportionate sentence at the time of a hearing on a request for bond pending appeal, indicating that:

"...this is an extraordinary prosecution, because there was no Federal involvement until the State authorities brought it to the Federal authorities.

And it's an unfortunate set of circumstances. But that's no business of mine. I deal with it from the indictment. And, thus far, the Supreme Court has not suggested that it represented any kind of misconduct for that to occur.

And there was little offense to the dignity to the United States of America in this offense.

Furthermore, there was no evidence of trafficking, except

a conclusion to be drawn from the quantity.

And, five, taking the totality of the circumstances of the offense, the penalty as required under the sentencing

guidelines is grossly disproportionate.

When I put all those together, I have an uneasy feeling as to whether or not I can be assured -- say with any great satisfaction that this conviction will be confirmed at a higher level. So, therefore, I will grant the Defendant bond pending appeal." (Hearing on Motion of Bond Pending Appeal, 3-2-94, pp 3-4)

In short, the facts of this case make it more like <u>Halper</u>. There is no need to use the categorical approach attributed to the Sixth Circuit. An examination and analysis of this case on its facts justifies the conclusion that the forfeiture was punishment.²

Petitioner also argues that there is a conflict among the Circuit Court of Appeals with respect to the issue of whether forfeiture is punishment for purposes of the Double Jeopardy Clause. It should be noted that neither of the cases cited by the government are cases involving forfeiture under the statute at issue in this case. In <u>United States</u> v <u>Morgan</u>, 51 F 3d 1105 (CA 2, 1995) the court was considering the impact of a civil settlement agreement which included a restitution provision on the government's prosecution for the misconduct relating to a savings and loan operation which resulted in the civil settlement. Ignoring the label given to the restitution in the agreement, the court found that the \$1.5 million was not punishment because it was

Such a showing appears to be appropriate under <u>Halper</u>. The Court noted that where a defendant has previously sustained a criminal penalty and the civil penalty "bears no rational relation to the goal of compensating the government for its loss ... then defendant is entitled to an accounting of the governments damages and costs to determine if the penalty sought in fact constitutes double punishment". 104 L Ed 2d 487, 502.

The government could have avoided the problem created by the duplications proceedings in this case by combining the forfeiture case with the criminal case using criminal forfeiture proceedings under 21 USC 853.

designed to repay that portion of the total loss occasioned by the misconduct which was suffered by the government, which was required to close down the savings and loan. In this case, no such comparison is applicable. Here the drug forfeiture statute did not gauge the monetary assessment to any damage done the government. The government obtaining the forfeited property was not the sovereign investigating the case. In <u>United States</u> v \$145,139 U.S. Currency, 18 F 3d 73 (CA 2, 1994) the government sought to forfeit the currency which the defendant had attempted to take out of the United States in violation of 31 USC 5316. Under this statutory scheme the government is allowed to take the instrumentality of the offense. Even though the currency is not contraband, it is subject to seizure as a means by which the remedial goals of the statutory scheme are satisfied. Congress apparently determined that it was inappropriate to put those funds back in the hands of the individual who has possessed the currency for fear that the offense conduct might be repeated. In short, neither of these cases evidence a conflict with respect to the specific statutory scheme at issue in this case. Because of the different statutory characteristics confronted in both of those cases, it is impossible to conclude that they conflict with the decision in this case.

The Sixth Circuit's application of the conclusion in <u>Austin</u> v <u>United States</u>, 509 U.S. ____, 125 L Ed 2d 488, 113 S Ct 2801 (1993) that forfeiture under 21 USC 881(a)(7) is punishment cannot reasonably be assailed and still be consistent with <u>stare decisis</u>. One need only ask whether the Sixth Circuit could have held that

forfeiture is not punishment to see the absurdity of the government's challenge to this prong of the Sixth Circuit's analysis. The conclusion in <u>Austin</u> that forfeiture under 21 USC 881(a)(7) is punishment was shared by six (6) members of the Court. The Sixth Circuit could not disregard this established precedent.

II.

The government also attacks the Sixth Circuit's conclusion that this Defendant was punished for the same offense by the imposition of both forfeiture and imprisonment. There is no question that the forfeiture complaint in this case was based on the same conduct for which he was indicted. While this similarity is not controlling, the criminal punishment imposed in this case involved the same statutory elements as the particular forfeiture. The statutory scheme compels this conclusion. To impose forfeiture the government claimed and offered to prove that the Respondent's real property was used to facilitate the growing of marijuana. To impose imprisonment, the government would have to show that the accused knowingly and intentionally grew marijuana.3 The latter proposition is necessarily included in the first. With respect to both statutory schemes, the government would have to show that Respondent grew marijuana from his residence.4

In fact, the evidence presented at the criminal trial was that the Respondent started the growing process by nurturing seedling marijuana plants in his residence and later replanted them. At trial, this process was described in detail by the informant, Heather McPherson.

In footnote 3, p. 12 of its Petition, the government indicates that the facts suggest that the forfeited real property was not the actual site of the growing marijuana and therefore the

The government argues that one could have property forfeited without showing that actual growing has occurred, claiming hypothetically that it is enough that the property was intended to be used for that purpose. This argument elevates form over substance. Absent a confession that one's property is going to be used to grow marijuana, the only method of demonstrating an intent to use the property is proof that someone engaged in conduct that would allow that intent to be inferred. Moreover, reliance on hypothetical bases for application of the double jeopardy protection has been thoroughly criticized as overly technical and not in keeping with the purposes behind the constitutional protection. See Justice White's opinion in <u>United States</u> v <u>Dixon</u>, 509 U.S. ____, 125 L Ed 2d 556, 592-594, 113 S Ct 2894 (1993).

In paragraph 5 of its Complaint for Forfeiture, the government claimed that the real property was used or intended to be used to facilitate the unlawful processing and distribution of marijuana, but then referred to the Affidavit in Support of Seizure Warrant as more fully setting forth its claim. That document fails to allege facts that show a mere intent to use. That document sets forth

forfeiture and criminal prosecution are not the same offense. This claim is faulty in two respects. First, it focuses on the specific conduct involved in the case, an approach the government abhors when suggesting that under the forfeiture statute it is possible to merely intend to use the property illegally and have the property forfeited. Second, it ignores that fact the government alleged in the forfeiture complaint and offered proof at trial that the growing process started at Respondent's residence and that Respondent used his residence as a base of operations for nurturing the growing plants. Such evidence was essential for the government to establish a connection between the Respondent's home and the growing operation and to establish that Respondent knew about and grew the marijuana which was on adjoining real property.

This portion of the government's argument urges an analysis and focus that is hypertechnical and formalistic. It defies the well established judicial approach to each case on its facts, and in the process, ignores the goals of the constitutional protection.

III.

The last reason Petitioner uses to persuade this Court to grant certiorari concerns the Sixth Circuit's determination that the simultaneous prosecution of the civil forfeiture and the criminal indictment, filed several months apart, were not the "same proceeding" for purposes of the Double Jeopardy Clause. Unlike its argument with respect to the "same offense", wherein Petitioner recommended a formalistic approach, the government now urges rejection of formalistic and technical considerations and instead, requests that this Court focus on the general purposes of the Double Jeopardy Clause. In effect, the Petitioner seeks to ignore reality. The government filed two separate proceedings in front of different judges prosecuted by different prosecutors. Petitioner does not provide this Court with the principled formula that makes these proceedings the same for double jeopardy purposes. The fact that the Respondent knew that he could suffer both forfeiture and imprisonment does not make the proceedings the same under any rational formulation of the rule and does not change the reality of the situation facing Respondent.

Petitioner's view ignores other abuses presented by the method of proceeding which characterized this case. The Double Jeopardy Clause is designed to prevent successive prosecutions for the same offense, not simply prevention of multiple punishments. While in this particular case the criminal trial proceeded, in subsequent cases where this peculiarity does not exist, the conduct of a trial itself would be subject to being barred. Additionally, a person whose property is subject to civil forfeiture is forced to make decisions which may affect his legal position during the criminal case. For example, while his exercise of the Fifth Amendment right to remain silent may not be used against him in a criminal case, it is a fact that can be used against him in the civil forfeiture case. Similarly, if he testifies during the forfeiture proceeding and makes any admissions, they can be used as substantive evidence in the criminal case. The financial resources needed to fight the criminal case may be depleted by a successful civil forfeiture prosecution. In short, it would be unfortunate to accept the conclusion of the dissenting judge in this case. In other words, in cases like this one, extending the protections of the Double Jeopardy Clause would depend on whether the government was satisfied with the outcome of the first proceeding. Persons who are able to determine that the government was dissatisfied with the

IV.

The Petitioner's claim that the decision in this case limits the government's options should not be viewed with alarm. The government has been aware, at least since Austin and Halper that its method of proceeding in these cases has implicated the Double Jeopardy Clause. Other courts could grant the decision in this case only prospective effect. Moreover, the government has always possessed the option of proceeding in a single action including both the criminal offense and the forfeiture of the accused's property by invoking the provisions of the criminal forfeiture statute, 21 USC 853. The provisions of that statute are almost identical to those at issue in this case. Under §853 the government is entitled to forfeit the property of a person convicted of a statutory violation in which it was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation". The government in this case elected to proceed under the civil forfeiture statute, knowing that procedure imposed increased costs, greater risks and increased pressure on the Respondent. That election succeeded in inducing him to enter into a consent judgment forfeiting the home he legitimately purchased. This is the kind of abuse that the Double Jeopardy Clause is designed to eliminate. The Sixth Circuit so found and its decision was appropriate.

The <u>Austin</u> case was decided at about the time the trial in this case commenced. Respondent raised the double jeopardy issue after trial, but before sentencing.

CONCLUSION

The petition for writ of certiorari should be denied.

September 25, 1995

Respectfully submitted,

Lawrence J. Emery Attorney for Respondent 3401 E. Saginaw, Suite 104 Lansing, MI 48912

(517) 337-4866

AO 109 (2/90) Seizure Warrant

Eastern DISTRICT OF Michigan				
CT OF Michigan				
LAWRENCE ZATKOFF				
SEIZURE WARRANT				
CASE NUMBER: 92 X 7 5 8 4 3				
ation and any Authorized Officer of the United States				
er J. Hackbarth who has reason to				
strict of Michigan there is now				
XTURES, IMPROVEMENTS AND				
ny establish probable cause to believe that the property so ssuance of this seizure warrant.				
property specified, serving this warrant and making the seizure ay or night as I find reasonable cause has been established) y seized, and prepare a written inventory of the property				
U.S. Judge or Magistrate				
CLERY "				

SEP 30 1992

Detroit, Michigan City and State

Name and Title of Judicial Officer

MAGISTRATE JUDGE VIRGINIA MORGAN

12

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

LAWRENCE ZATKOFF

UNITED STATES OF AMERICA.

Plaintiff

Misc. No. 92 X7 5843

vs.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

Defendant.

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANT

State of Michigan)
) ss
County of Shiawassee)

- I, Christopher J. Hackbarth, being duly sworn state:
- I am a duly appointed Special Agent of the U.S. Drug Enforcement Administration (DEA), having been employed as such since 1991
- 2. By virtue of my employment with DEA, I perform various tasks which include:
 - A. Functioning as a surveillance agent observing and recording movements of persons suspected of trafficking in drugs.
 - B. Interviewing witnesses and informants relative to the illegal trafficking of drugs and the distribution of monetary assets derived from the illegal trafficking of drugs.

- C. Investigating asset forfeiture relative to the persons property that was used or intended to be used to facilitate a drug violation.
- 3. I have participated in numerous domestic marijuana investigations from which I have learned:
 - A. That marijuana growers use specialized lighting systems to imitate sunlight. These lighting systems, in combination with electrical pumps, special exhaust vents to reduce heat and/or odor, and fans used to circulate carbon dioxide and oxygen substantially increase an indoor marijuana grower's electric cost.
 - B. That marijuana growers attempt to conceal the rooms or buildings used for growing. This frequently takes the form of blacking out all windows and/or sources of outside light.
 - C. That marijuana growers use chemicals to enhance growth, promote blooming and budding, and to regulate the acidity of the water for optimum growing conditions.
 - D. That marijuana growers may keep guns at the locations when they cultivate their marijuana to protect their operations.
 - E. That marijuana growers often start marijuana plants from seeds or seedlings indoors and transplant them outside as the spring growing season arrives.
 - F. That marijuana growers often plant the marijuana plants outdoors in areas away from their residence, and in a number of small plots so as not to bring suspicion upon the growers.
- 4. As part of my responsibilities, I was specifically assigned to aid in the investigation of Guy URSERY in the seizure regarding their use of real property located at 1700 Braden Road, Perry, Michigan, with reference to the manufacture and/or housing or facilitating of drug trafficking. This location is more particularly described as:

Part of the West 1/2 of the Northeast 1/4 of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North 1/4 corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

(Commonly known as 1700 Braden Road, Perry, Michigan)

- 5. As a result of reports made available to me from State law enforcement officers of the Michigan State Police and the Morrice, Michigan Police Department, I have learned the following:
- 6. Officer Chester Farrier of the Morrice, Michigan, Police Department has a reliable confidential informant, hereafter referred to as STATE-1. STATE-1 advised Officer Farrier that he/she is aware of a subject named Guy URSERY, whom STATE-1 has known for several years. STATE-1 told Officer Farrier that URSERY grows marijuana on his property every year by first starting seedlings indoors, and then transplanting them outside to let the plants grow to maturity.
- 7. The informant further advised Officer Farrier that some of the marijuana is dried by URSERY on a woodpile in URSERY's backyard and the marijuana is stored in a crawl space of the residence.

- 8. The informant further said that he/she could draw a map of the exact location of the growing marijuana.
- Officer Farrier then brought this information to the attention of D/Lt. Mike Pifer, and D/Trpr. Tom Feahr of the Michigan State Police-East Lansing Criminal Investigations Team.
- 10. Trpr. Feahr personally verified through Michigan Secretary of State driver and vehicle records, that a Guy URSERY showed to reside at 1700 Braden Road, Perry, Michigan.
- by STATE-1, drove by URSERY's residence and saw that the map closely resembled the residence and the surrounding area. They then used the map to locate three outdoor marijuana growing plots on URSERY's property. Two of the plots contained at least nine growing marijuana plants each, while the third contained at least twenty-five plants. Trpr. Feahr seized one growing marijuana plant from one of the plots and both officers left.
 - 12. Trpr. Feahr then had a laboratory exam performed on the marijuana plant, and it was found to be marijuana.
 - 13. Based on the above information, Trpr. Feahr obtained a search warrant from the Shiawassee County Prosecutor's Office on July 29, 1992. The warrant was signed by Magistrate Barnes.
 - 14. On July 30, 1992, members of the Michigan State Police executed the search warrant at 1700 Braden Road, Perry, Michigan. The three outdoor grow plots which had been found by Trpr. Feahr earlier were located, as well as three additional outdoor grow plots. Numeric seeds, stems and other marijuana plant material was also found inside the residence, as documented below:

- A. two (2) brown paper sacks, containing 34 clear plastic baggies, each baggie containing a quantity of green plant stems and seeds, later found to be marijuana, retrieved from the right side, middle drawer of the desk in bedroom No. 1.
- B. one (1) brown pill bottle in the name of Sandra Cain containing suspected marijuana seeds, retrieved from the right side, middle drawer of the desk in bedroom No. 1.
- C. one (1) Reebok shoe box with ten (10) clear plastic baggies, each containing suspected marijuana seeds. The box also contained loose seeds. Item was retrieved from shelf of closet in bedroom No. 1.
- D. a quantity of marijuana plant stalks and stems, found in the crawl space of the residence.
- E. two (2) clear plastic baggies with suspected marijuana seeds inside, retrieved from the closet of the radio room.
- F. a one (1) pound box of Ortho general purpose plant food found on a workbench in the garage.
- G. one (1) Mossberg 12 gauge shotgun, model 600AB, serial #C80054, found loaded in bedroom No. 1.
- H. twenty-four (24) marijuana plants from grow plot #1.
- thirty-three (33) marijuana plants from grow plot #2.
- fourteen (14) marijuana plants from grow plot #3.
- K. ten (10) marijuana plants from grow plot #4.
- L. forty-nine (49) marijuana plants from grow plot #5.
- M. twelve (12) marijuana plants from grow plot #6.

- N. one (1) Sylvania grow light, a "Gro-Lux" catalog, #GL-1302, a two foot fixture and bulb, and two aluminum support brackets, all found in a box.
- O. three (3) clear plastic baggies containing green plant stems and seeds, and a pill bottle in the name of Guy URSERY with a partially burnt hand rolled cigarette inside, found in the upper left desk drawer in bedroom No. 1.

The above drug exhibits were sent to the Michigan State Police Crime Lab for analysis. This analysis indicated the above substances were in fact marijuana.

15. A real property title ownership and encumbrance search for the real property located at 1700 Braden Road, Perry,
Michigan revealed a Warranty Deed, dated July 15, 1988 between
Rosalio De La Garza and Linda Marie De La Garza, his wife (as sellers) and Guy URSERY and Cynthia K. URSERY, his wife (as buyers) for said property, reflecting the consideration of
\$19,900.00. The title search further revealed a Mortgage, dated
May 2, 1989 between Guy J. URSERY and Cynthia K. URSERY and NBD
Mortgage Company for 1700 Braden Road, reflecting the principal sum of \$41,000.00. The State Equalized Value (SEV) for the above property is \$32,550.00.

Wherefore, based on the above presented facts, the affiant asserts that there is probable cause to believe that the above described parcel of real property is subject to seizure and forfeitable as set forth in Title 21 U.S.C. 881(a)(7).

Dated:

Special Agent Christopher Hackbarth Drug Enforcement Administration

Subscribed and sworn to before me this day of SEP 30 1992

VIRGINIA M. MORGAN

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA PRESENTENCE INVESTIGATION REPORT Docket No. 93-CR-50016-FL-01 GUY JEROME URSERY

Prepared For:

The Honorable Avern Cohn United States District Judge

Prepared By:

Joseph B. Herd

United States Probation Officer

(313) 766-5163

Assistant U.S. Attorney Marlene Dayne

210 Federal Building 600 Church St.

Flint, Michigan 48502

(313) 766-5177

Defense Counsel (Retained)

Lawrence Emery

3401 E. Saginaw, Suite 104 Lansing, Michigan 48912

(517) 337-4866

Sentence Date:

Unknown

Offense:

21 U.S.C.§ 841(a)(1), Count 1: Manufacture of Marijuana, a Class B Felony, 5-40 years and/or a \$2,000,000.00 fine, with at least four years supervised release, plus a special assessment fee

of \$50.00.

Release Status:

On June 16, 1993, the defendant was

released on a \$10,000.00 unsecured

bond.

Detainers:

None

Codefendants:

None

Related Cases:

None

Date Report Prepared: 8/4/93 Date Report Revised:

Identifying Data:

Date of Birth: 8-4-56
Age: 37
Race: White
Sex: Male

SSN No: 363-64-7660
FBI No: 986610RA3
USM No: Not returned

Other ID No: U-626-291-402-610 (M.D.L.#)

Education: GED Dependents: One

Citizenship: United States

Legal Address: 1700 Braden Road

Perry, Michigan 48872

Aliases: Jerry

PART A. THE OFFENSE

Charge(s) and Conviction(s)

- On February 5, 1993, a federal Indictment was entered in the Eastern District of Michigan charging GUY JEROME URSERY with Count 1, Manufacturing of Marijuana, in violation of 21 U.S.C. § 841(a)(1) on or about July 30, 1992.
- 2. On March 1, 1993, the defendant made an initial appearance before U. S. Magistrate Judge Marc L. Goldman. Judge Goldman set a \$10,000.00 unsecured bond. Arraignment was held at the same time and the defendant entered a plea of not guilty.
- On June 16, 1993, the Honorable Stewart A. Newblatt granted a motion to modify the bond as to the defendant. An unsecured bond was set in the amount of \$10,000.00.
- 4. On June 25, 1993, there was an order by the Honorable Stewart A. Newblatt reassigning the case to the Honorable Avern Cohn for the purpose of conducting trial proceedings and any other related matters.
- 5. On June 30, 1993, a criminal jury trial began before the Honorable Avern Cohn.
- On July 2, 1993, the jury found GUY JEROME URSERY guilty of Count 1, Manufacturing of Marijuana, in violation of 21 U.S.C. § 841(a)(1) on or about July 30, 1992.
- 7. Pretrial Services reports that the defendant has been cooperative and has followed all conditions of his supervision. Urinalysis conducted by Pretrial Services and the Probation Department have returned negative for illicit drugs.

The Offense Conduct

- 8. Information in this section was obtained from records supplied by the Michigan State Police. The defendant was asked to submit a version of the offense in writing but declined.
- 9. The Michigan State Police were contacted by the Morrice, Michigan Police Department July 27, 1992. The Morrice Police Department said that they had an informant providing information to them regarding a marijuana growing operation by a person named GUY URSERY, and requested assistance developing the case.
- 10. The informant told Morrice Police that the defendant grows marijuana on his property by starting the plants as seedlings indoors and then transplants them outside to allow the

- plants to grow to maturity. Some of the marijuana is then dried on a woodpile in MR. URSERY'S back yard and the marijuana is stored in the crawl space of the residence.
- 11. The informant advised Morrice police that the defendant keeps numerous weapons inside the residence and has threatened to shoot anyone on his property.
- 12. On July 27, 1992, a Morrice police officer and a Michigan State Police officer drove to the URSERY residence. They walked onto the property and were able to locate three suspected marijuana plots by using a map supplied by the informant.
- 13. Two of the plots each contained at least nine plants, while one plot contained at least 25 plants. One plant was seized from a plot and the officers vacated the area.
- 14. On July 28, 1992, a Michigan State Police Laboratory expert verified that the plant taken from the residence was marijuana.
- 15. A search warrant was requested and authorized by the Shiawassee County Prosecutor's Office on July 29, 1992. On July 30, 1992, the Michigan State Police Emergency Support Team served a warrant at the URSERY residence. The only person in the house at the time of the raid was the defendant's wife, Cynthia K. Ursery.
- 16. Seized during the search was one Remington .22 caliber rifle, with one Bushnell .22 caliber scope. This gun, which had a broken stock, was loaded and stood against the door wall in the kitchen; one Mossberg .12 gauge loaded shotgun was standing in a bedroom. In the same room were a total of 44 clear plastic baggies, each containing a quantity of green plant stems and seeds; and one brown pill bottle containing seeds. Also seized were 142 marijuana plants from six plots in the yard, one Sylvania grow light, and support apparatus was found hanging from the ceiling in the crawl space.

Summaries of Drug Quantities Used to Compute Offense Level

	Date	Amount	Source	Page/Par.
17.	7/30/92	142 marijuana plants	Seizure/ lab report	Pg. 4/ Par.16

18. The 142 marijuana plants seized from MR. URSERY'S residence on July 30, 1992, are being used to compute the guidelines.

Victim Impact

19. There are no identifiable victims in this case.

Adjustment for Obstruction of Justice

20. There is no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

21. The defendant was found guilty of the offense by a jury. He chose to remain silent about his role in the offense and therefore, will not receive any adjustment for acceptance of responsibility.

Offense Level Computations

22. The November 1, 1992 edition of the <u>Guidelines Manual</u> has been used in this case.

Count 1 - Manufacture of Marijuana

- 23. Base Offense Level: The base offense level for a violation of 21 U.S.C. § 841(a)(1) is located at Section 2D1.1(a)(3), which references the Drug Quantity Table, Section 2D1.1(c)(9). An offense level of 28 is required for distribution of at least 100, but less than 400 kilograms of marijuana. +28
- 24. Specific Offense Characteristics: The defendant was in possession of two firearms, which were in close proximity to the marijuana stored in the home. Pursuant to 2D1.1(b)(1), the offense level will be increased by two points.
- 25. Victim Related Adjustment: None.

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27. Adjustment for Obstruction of Justice: None.

26. Adjustment for Role in the Offense: None.

- 28. Adjusted Offense Level (Subtotal):
- 29. Adjustment for Acceptance of Responsibility: None.
- 30. Total Offense Level:
- 31. Chapter Four Enhancements: None.
- 32. Total Offense Level:

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Adult Criminal Convictions

33. None.

Criminal History Computation

34. MR. URSERY has no criminal history points. According to the Sentencing Table in Chapter 5, this places the defendant in a criminal history category of I.

Other Criminal Conduct

35. None.

Pending Charges

36. None.

Other Arrests

37. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

- 38. GUY JEROME URSERY was born to Guy and Elizabeth Ursery (nee: Seely) on August 4, 1956, in Flint, Michigan. The defendant was the third of four children and the only male born to the couple. His siblings are Patricia June Larner, age 42, a housewife in Greenville, Michigan; Michelle Melinda Rushton, age 39, whereabouts unknown; and Anita Jo Townes, a shoe factory worker in Greenville, Michigan.
- 39. The defendant's family moved several times during his youth. All moves were either in the city of Flint or within approximately 20 miles of Flint.
- 40. Guy and Elizabeth Ursery divorced when the defendant was in the eighth grade. According to MR. URSERY, the divorce occurred because his father was an alcoholic. At the time of the divorce, MR. URSERY went to live with his father, and his sisters remained with his mother. The defendant soon moved to the home of his mother, as his father's drinking problem did not allow him to properly care for the defendant. MR. URSERY lived primarily at the home of his mother until the age of 16.
- 41. The defendant married his high school sweetheart, Cynthia Kay, on August 5, 1972, in Flint, Michigan. The couple remain married. They have one son, Brian Michael Ursery, age 20. He lives with his maternal grandparents in Flint Township.

Physical Condition

42. The defendant is 5'10" tall and weighs approximately 188 pounds. He has brown hair and hazel eyes. He has two tattoos on his left forearm, "Cindy" and "Love CR."

- 43. MR. URSERY was involved in a motorcycle accident on September 14, 1985, in which he hit a car head-on. His pelvic bone was broken. Verification is pending from McLaren Hospital in Flint.
- 44. MR. URSERY brought in a physician's note stating that he has had chronic bronchial asthma and allergies that requires medication. The note also states that the defendant has bilateral carpel tunnel syndrome which was caused by the defendant's work at General Motors.

Mental and Emotional Health

45. The defendant stated that he does not have a history of mental or emotional problems. He did say, however, that he is under a great deal of stress because of his current involvement in the legal system.

Substance Abuse

46. The defendant began using marijuana at the age of 14. He said he infrequently used the drug throughout his teen and early adult years. At the time of his arrest, MR. URSERY admits that he was smoking marijuana approximately two times per week. He said his last use was October 1, 1992. The defendant has never been involved in a drug treatment program.

Education and Vocational Skills

47. MR. URSERY dropped out of the tenth grade at Carman High School in 1972 to marry. He obtained his GED in 1991 from the Carman-Ainsworth District through a program sponsored by General Motors. He also completed a technical skills advancement course and passed a skilled trades test for General Motors. He is currently on the waiting list for the positions of pipe fitter, machine repair, or millwright.

Employment Record

- 48. The defendant is currently employed at the General Motors Truck and Bus Plant in Flint, Michigan. His position was that of an arc welder and he earns \$520.00 a week. The defendant began his employment at General Motors August 4, 1977.
- 49. From July of 1984 to July of 1985, MR. URSERY worked at Lake Orion Cadillac. His position was that of electrical repairman on Cadillacs and Oldsmobiles.
- 50. From July of 1982 to July of 1984, the defendant worked for National Roofing in Flint. His position was that of a hot tar roofer and he earned approximately \$150.00 per week.

51. From April of 1974 to June of 1979, the defendant worked for Fireball Rentals in Davison, Michigan. His position was that of a hot tar roofer and he earned approximately \$150.00 per week.

Financial Condition: Ability to Pay

52. The defendant submitted a signed financial statement and accompanying documentation supporting the following financial profile:

Assets

Bank Accounts

National Bank of Detroit (checking)	\$ 12.19
Unencumbered Assets	
1986 GMC Jimmy S-15	\$ 4,500.00
Equity in Other Assets	
Residence at 1700 Braden Rd., Perry, MI	\$ 9,000.00
TOTAL ASSETS	\$13,512.19
Unsecured Debts	-0-
Net Worth	\$13,512.19
Monthly Net Income	
Net salary	\$ 2,100.00
Monthly Necessary Living Expenses	
Mortgage Electric Heating oil/gas Telephone Groceries/supplies Auto insurance Transportation Clothing TOTAL NECESSARY EXPENSES	\$ 751.75 80.00 35.00 80.00 450.00 75.00 100.00 \$ 1,671.75
Net Monthly Cash Flow	\$ 428.25
HEE HOHERTY Cash Flow	9 428.25

PART D. SENTENCING OPTIONS

Custody

STATUTORY PROVISIONS:

53. The minimum and maximum terms of imprisonment for this offense are 5 to 40 years, pursuant to 21 U.S.C. § 841(b)(1)(B).

GUIDELINE PROVISIONS:

54. Based on a total offense level of 30 and a criminal history category of I, the guideline range is 97 to 121 months.

Impact of Plea Agreement

55. There was no plea agreement in this case as the defendant was found guilty by a jury.

Supervised Release

STATUTORY PROVISIONS:

56. 21 U.S.C. 841(b)(1)(B) requires a supervised release term of at least four years.

GUIDELINE PROVISIONS:

57. At least four years, pursuant to the statute.

Probation

STATUTORY PROVISIONS:

58. The defendant is not eligible for probation under the statute or the guidelines.

Fines

STATUTORY PROVISIONS:

- 59. The maximum fine amount in this case is \$2,000,000.00, pursuant to 21 U.S.C. § 841(b)(1)(B).
- 60. A special assessment fee of \$50.00 must be imposed, pursuant to 18 U.S.C. § 3013.

GUIDELINE PROVISIONS:

61. The fine range for this offense is \$15,000.00 to \$2,000,000.00, pursuant to 5E1.2(c)(3) and 5E1.2(c)(4).

62. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release. The most recent advisory from the Administrative Office of the United States Courts suggests that a monthly cost of \$1,734.00 be used for imprisonment, \$180.90 for supervision, and \$1,132.00 for community confinement.

Restitution

63. The Victim and Witness Protection Act does not apply to Title 21 offenses. Therefore, restitution is not applicable in this case.

Denial of Federal Benefits

STATUTORY PROVISIONS:

64. For individuals convicted of an offense occurring on or after September 1, 1989, the Court may order that the defendant will be ineligible for certain federal benefits. Since this offense occurred after September 1, 1989, the denial of federal benefits may be considered. The length of such ineligibility may range from one year for Possession of Controlled Substances, to five years for a first conviction for Distribution.

GUIDELINE PROVISIONS:

65. According to Section 5F1.6 of the Guidelines Manual, the denial of federal benefits is a sentencing option for drug offenses.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

66. None.

Respectfully submitted,

Raymond L. Frank, Jr. Chief U.S. Probation Officer

by

Joseph B. Herd

U. S. Probation Officer

Reviewed and Approved:

Fred S. Tryles, Supervising

U. S. Probation Officer

3

No. 95-345

FILED
NOV 15 1995

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-345

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Sixth Circuit reversed respondent's conviction for manufacturing marijuana on the ground that the conviction was a "second punishment that violates the Double Jeopardy Clause." Pet. App. 6a. As we demonstrated in the petition (Pet. 7-14), that conclusion embodies three errors of double jeopardy law, will disrupt the enforcement of the criminal laws in the Sixth Circuit, and will significantly contribute to the widespread confusion that exists in the lower courts concerning the applicability of the Double Jeopardy Clause to civil forfeiture statutes. Respondent's brief in opposition does not cast doubt on those propositions or the need for this Court's review.

1. Respondent contends (Br. in Opp. 6-7) that the Sixth Circuit's conclusion that all forfeitures under 21 U.S.C. 881(a)(7) inflict "punishment" for double jeopardy purposes "cannot reasonably be assailed and still be consistent with stare decisis," in light of Austin v. United States, 113 S. Ct. 2801 (1993). As we have explained (Pet. 8-9), however, Austin involved the Excessive Fines Clause of the Eighth Amendment, not a double jeopardy claim, and the Court expressly recognized that it "ma[de] little practical difference" in that case, in light of the nature of the Eighth Amendment claim, whether all forfeitures under the statute were considered punitive. 113 S. Ct. at 2812 n.14.

In the present context, it does make a difference, and respondent has failed to offer any sound reason why the holding in Austin should be transposed to the double jeopardy context. Indeed, in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), this Court unanimously concluded that a similarly worded forfeiture statute served goals "plainly more remedial than punitive," id. at 364, and that accordingly a forfeiture of goods under it was "not barred by the Double Jeopardy Clause." Id. at 366. Until squarely overruled by this Court, that double jeopardy holding controls this case, and the Sixth Circuit was not free to disregard it. See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Respondent also contends (Br. in Opp. 6) that the Sixth Circuit's conclusion that forfeitures of drug instrumentalities under Section 881(a)(7) are always punitive for double jeopardy purposes does not conflict with *United States* v. \$145,139, 18 F.3d 73 (2d Cir.), cert. denied, 115 S. Ct. 72 (1994), because \$145,139

involved a forfeiture under a different statute (31 U.S.C. 5316). As the Second Circuit recently observed, however, its general approach to forfeitures of instrumentalities of crime differs from the categorical analysis employed by the Sixth Circuit:

[W]e are hesitant to conclude that the Supreme Court meant its decision in Austin, a case addressing the Excessive Fines Clause, to reformulate the standards [United States v. Halper, 490 U.S. 435 (1990)] had established for the Double Jeopardy Clause. * * * Only if we read Austin and [Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994),] as making major changes in double jeopardy analysis, sub silentio, would we have to conclude that [a] particularized approach to the question of "punishment" * * * has been cast aside. And, in fact, rather than reading Austin or Kurth Ranch in this way, we have continued to follow Halper and to make individualized, case-by-case determinations of whether particular civil sanctions constitute "punishment" even after Austin and Kurth Ranch (albeit without discussion of these cases).

United States v. All Assets of G.P.S. Automotive Corp., No. 94-6115 (2d Cir. Sept. 18, 1995), slip op. 7490 (involving a forfeiture secured under 21 U.S.C. 981, and citing, inter alia, United Stepe v. Morgan, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995), and \$145,139, supra).

Respondent also contends (Br. in Opp. 3-4) that a detailed examination of the "actual facts of this case" under *Halper* would establish that the forfeiture to which he stipulated inflicted "punishment" on him.

Respondent asserts (id. at 4) only that he was not "an affluent drug dealer," that he was deprived of his residence, and that the government did not establish that it incurred any expenses in prosecuting him. Under Halper, however, the government is not required to provide an accounting of its costs unless it first appears that "the civil penalty * * * bears no rational relation" to a non-punitive goal. 490 U.S. at 449. That question is not determined "from the defendant's perspective" since "for [him] even remedial sanctions carry the sting of punishment." Id. at 447 n.7. In any event, the Sixth Circuit did not rule in respondent's favor based on Halper or the peculiar facts of his case, but instead rejected Halper's case-by-case analysis of punishment issues in favor of a categorical approach. It is that conclusion that warrants further review by this Court.

2. Respondent contends that the forfeiture action and the criminal prosecution involved the "same offense" for double jeopardy purposes, because they were "based on the same conduct." Br. in Opp. 7. In United States v. Dixon, 113 S. Ct. 2849 (1993), however, this Court overruled Grady v. Corbin, 495 U.S. 508 (1990), and rejected that case's "same-conduct" test to determine whether two statutory provisions define the "same offense." It is now settled that two offenses are not the "same" when each offense has at least one statutory element not shared by the other, under the longstanding rule of Blockburger v. United States, 284 U.S. 299 (1932). See United States v. Dixon, 113 S. Ct. at 2856; see also Witte v. United States, 115 S. Ct. 2199, 2204 (1995). As we have demonstrated (Pet. 11-12), the manufacturing and forfeiture "offenses" at issue here cannot be considered the

same under the "statutory elements" test of Block-burger.*

Respondent does suggest that the "criminal punishment imposed in this case involved the same statutory elements as the particular forfeiture." Br. in Opp. 7. But respondent's claim is based on a comparison of what "the government claimed and offered to prove" in each case. *Ibid.* That interpretation of *Blockburger* is mistaken. The formulation the Court employed in *Blockburger* turns on the facts that the statute requires to be proved, not those that become relevant in a given case: two offenses are different if "each *provision* requires proof of a fact which the other does not." 284 U.S. at 304 (emphasis added); see

^{*} Respondent faults us for pointing out (Pet. 12 n.3) that his criminal conviction for manufacturing marijuana did not involve his real property, since the marijuana in question was growing beyond his property line. Br. in Opp. 7-8 n.4. In respondent's view, our reliance on that fact is inconsistent with the "elements" test of Blockburger. Respondent's argument confuses two different aspects of the Blockburger decision. The better-known holding of that case is, of course, that violations of two statutes do not amount to the same offense if each "requires proof of a different element." 284 U.S. at 304. Blockburger also held, however, that repeated violations of the same statute (which obviously would be the same offense under the "elements" test) are still different "offenses" if each resulted from a fresh "impulse." Id. at 303. Thus, in Blockburger, two separate sales of narcotics were held to be different offenses even though the same statute was violated by each. The Sixth Circuit's decision not only misapplied the "elements" test, but also ignored that second holding of Blockburger. Even if the marijuana and forfeiture "offenses" were the same under the "elements" test, it remains a fact that respondent's criminal conviction for manufacturing marijuana was not based on his growing marijuana on the property that the government sought to forfeit.

also United States v. Woodward, 469 U.S. 105, 108 n.4 (1985) (alternative theory of liability was available under one of the statutes on which the government relied, even if that was not the theory on which the government proceeded in the particular case); Albernaz v. United States, 450 U.S. 333, 338 (1981) ("As Blockburger and other decisions applying its principle reveal, . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact, that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes," quoting Ianelli v. United States, 420 U.S. 770, 785 n.17 (1975)).

3. The Sixth Circuit's conclusion that the marijuana-manufacturing and forfeiture "offenses" were not part of the same proceeding for double jeopardy purposes conflicts with the decisions of two circuits. See *United States* v. *One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994). Respondent does not explain why that conflict does not demonstrate the need for further review in this case.

Respondent asserts instead that reversal of the Sixth Circuit's conclusion might lead to abuses by the government. In particular, respondent notes that a person's invocation of his right against compulsory self-incrimination "can be used against him in the civil forfeiture case." Br. in Opp. 10. That possibility, however, results from this Court's decisions interpreting the Self-Incrimination Clause of the Fifth Amendment, see, e.g., Baxter v. Palmigiano, 425 U.S. 308 (1976), and would remain even if the government sought a civil forfeiture without ever seeking to

punish the property's owner criminally. It is therefore hard to see how that is the sort of practice against which the Double Jeopardy Clause can reasonably be said to afford protection. More pertinent in this case is the fact that the government made clear its intent to proceed against respondent and his property before the protections of the Double Jeopardy Clause ever attached. This therefore is quite plainly not a case in which the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." United States v. Halper, 490 U.S. 435, 451 n.10 (1989). The Sixth Circuit's contrary conclusion warrants this Court's review.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III Solicitor General

NOVEMBER 1995

FEB 23 1996

Nos. 95-345 and 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

United States of America, petitioner

v.

Guy Jerome Ursery

UNITED STATES OF AMERICA, PETITIONER

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

JOINT APPENDIX

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-345

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

No. 95-346

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (FLINT)

CRIMINAL DOCKET FOR CASE #: 93-CR-50016-ALL

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
2/5/93	1	INDICTMENT against GUY JEROME URSERY (1) count(s) 1 (1016) [Entry date 02/08/93]
3/1/93		INITIAL appearance by defendant GUY JEROME URSERY (1) count(s) 1 before Magistrate Judge Marc L. Goldman, set unsecured bond in the amount of \$10,000.00 as to defendant GUY JEROME URSERY with conditions - D/Atty: Lawrence Emery - AUSA: Marlene Dayne - Tape # 93-5 (1050) [Entry date 03/02/93]
3/1/93		ARRAIGNMENT held as to defendant GUY JEROME URSERY, plea of not guilty entered - Magistrate Judge Marc L. Goldman - D/

DATE	NR	PROCEEDINGS
		Atty: Lawrence Emery - AUSA: Marlene Dayne - Tape #: 93-5 (1050) [Entry date 03/02/93]
3/1/93	2	APPEARANCE for defendant GUY JEROME URSERY of attorney Lawrence J. Emery and demand for Rule 16 disclosures (1016) [Entry date 03/09/93]
3/1/93	3	ACKNOWLEDGEMENT by defendant GUY JEROME URSERY of indictment [1-1] (1016) [Entry date 03/09/93]
3/1/93	4	ORDER by Magistrate Judge Marc L. Goldman, setting unsecured bond in the amount of \$10,000.00 as to defendant GUY JEROME URSERY with conditions (1016) [Entry date 03/09/93]
3/1/93	5	BOND in the amount of \$10,000.00 unsecured entered as to defendant GUY JEROME URSERY (1016) [Entry date 03/09/93]
3/2/93	6	STANDING ORDER for discovery and inspection and fixing motion cutoff date in criminal cases by Judge Stewart Newblatt with Proof of Mailing (1016) [Entry date 03/09/93]

DATE	NR	PROCEEDINGS
3/9/93	9	NOTICE of pretrial conference with proof of mailing (1016) [Entry date 03/17/93]
3/15/93	7	PROOF of mailing of Appearance and Demands for Rule 16 Dis- closures (1016) [Entry date 03/17/93]
3/15/93	8	PROOF of mailing of Appearance and Demands for Rule 16 Dis- closures (1016) [Entry date 03/17/93]
3/17/93	10	ORDER by Judge Stewart New- blatt, deadline for filing motions, plea, final pretrial conference, crimi- nal jury trial (sched events were not done because prior to doing them the Order was amended and the sched events were done on the new dates) (1016) [Entry date 03/25/93]
3/18/93	10	ORDER by Judge Stewart New- blatt, deadline for filing motions, plea, final pretrial conference, crimi- nal jury trial (1016) [Entry date 03/25/93]
3/18/93		SCHEDULE: by Judge Stewart Newblatt deadline for filing motions set for 4/2/93, plea set for 4/20/93 for GUY JEROME URSERY, final pretrial conference set for 1:30 4/20/93, criminal jury trial set for

DATE	NR	PROCEEDINGS
		8:00 5/5/93 for GUY JEROME URSERY (1016) [Entry date 03/25/93]
4/5/93	12	MOTION by defendant GUY JEROME URSERY to strike mandatory minimum sentence provision of 21 USC 841(b) with brief (1016) [Entry date 04/14/93]
4/5/93	13	MOTION by defendant GUY JEROME URSERY for disclosure of informant with brief (1016) [Entry date 04/14/93]
4/5/93	14	MOTION by defendant GUY JEROME URSERY for evidentiary hearing and to suppress evidence with brief (1016) [Entry date 04/14/93]
4/6/93	15	striking motion to strike mandatory minimum sentence provision of 21 USC 841(b) by GUY JEROME
		URSERY [12-1] (1016) [Entry date 04/14/93]
4/6/93	15	ORDER by Judge Stewart Newblatt striking motion for disclosure of

DATE	NR	PROCEEDINGS
		informant by GUY JEROME URSERY [13-1] (1016) [Entry date 04/14/93]
4/6/93	15	ORDER by Judge Stewart Newblatt striking motion for evidentiary hearing by GUY JEROME URSERY [14-1], striking motion to suppress evidence by GUY JEROME URSERY [14-2] (1016) [Entry date 04/14/93]
4/12/93	16	MOTION by defendant GUY JEROME URSERY for evidentiary hearing and suppression of evidence with brief (1016) [Entry date 04/15/93]
4/12/93	17	MOTION by defendant GUY JEROME URSERY for disclosure of informant with brief (1016) [Entry date 04/15/93]
4/12/93	18	MOTION by defendant GUY JEROME URSERY to strike mandatory minimum sentence provision of 21:841(b) with brief (1016) [Entry date 04/15/93]
4/12/93	19	PROOF of mailing of motions by Defendant Ursery (1016) [Entry date 04/15/93]

DATE NR PROCEEDINGS STIPULATION by defendant GUY 4/16/93 JEROME URSERY, plaintiff USA for a continuance (1016) [Entry date 04/26/93] ORDER by Judge Stewart New-4/19/93 blatt, deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1], motion for disclosure of informant by GUY JEROME URSERY [17-1], motion for evidentiary hearing by GUY JEROME URSERY [16-1], motion suppression of evidence by GUY JEROME URSERY [16-2]. final pretrial conference, criminal jury trial (1016) [Entry date 04/26/93] SCHEDULE: by Judge Stewart 4/19/93 Newblatt deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1] set for 5/17/93, motion for disclosure of informant by GUY JEROME URSERY [17-1] set for 5/17/93, motion for evidentiary hearing by GUY JEROME URSERY [16-I] set for 5/17/93, motion suppression of evidence by GUY JEROME

DATE NR PROCEEDINGS URSERY [16-2] set for 5/17/93 (1016) [Entry date 04/26/93] 4/19/93 SCHEDULE: by Judge Stewart Newblatt final pretrial conference set for <date not set>, criminal jury trial set for 8:00 6/8/93 for GUY JEROME URSERY (1016) [Entry date 04/26/93] 4/19/93 EXCLUDABLE interval of type XT beginning 4/12/93 and ending 6/8/93 per order deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1], motion for disclosure of informant by GUY JEROME URSERY [17-1], motion for evidentiary hearing by GUY JEROME URSERY [16-1], motion suppression of evidence by GUY JEROME URSERY [16-2] [21-1] (1016) [Entry date 04/26/93] by defendant 4/30/93 MOTION GUY JEROME URSERY to adjourn trial with brief (1016) [Entry date 05/13/93] 4/30/93 ORDER by Judge Stewart Newblatt granting motion to adjourn trial by

DATE	NR	PROCEEDINGS
		GUY JEROME URSERY [22-1] (1016) [Entry date 05/13/93]
4/30/93		SCHEDULE: by Judge Stewart Newblatt criminal jury trial set for 8:00 6/21/93 for Guy Jerome Ursery, final pretrial conference set for 3:00 6/16/93 (1016) [Entry date 05/13/93]
5/3/93	24	PROOF of mailing of Motion to adjourn trial, Brief and Order (1016) [Entry date 05/13/93]
5/12/93	25	REQUEST by defendant Guy Jerome Ursery, plaintiff USA to continue trial until 6/25/93 (1016) [Entry date 05/13/93]
5/13/93		EXCLUDABLE interval of type XT4 beginning 6/8/93 and ending 6/21/93 per order [23-1] (1016) [Entry date 05/13/93]
5/17/93	26	ORDER by Judge Stewart Newblatt adjourning criminal jury trial and allowing excludable (1016) [Entry date 05/21/93]
5/17/93		SCHEDULE: by Judge Stewart Newblatt criminal jury trial set for 8:00 6/28/93 for Guy Jerome Ursery (1016) [Entry date 05/21/93]

DATE	NR	PROCEEDINGS
5/17/93		EXCLUDABLE interval of type XT4 beginning 6/8/93 and ending 6/21/93 per order criminal jury trial [26-1], order [26-2] (1016) [Entry date 05/21/93]
5/24/93	27	RESPONSE by plaintiff USA to motion for disclosure of informant by Guy Jerome Ursery [17-1] with brief (1016) [Entry date 05/25/93]
5/24/93	28	RESPONSE by plaintiff USA to motion for evidentiary hearing by Guy Jerome Ursery [16-1] with brief (1016) [Entry date 05/25/93]
5/24/93	29	RESPONSE by plaintiff USA to motion to strike mandatory minimum sentence provision of 21:841(b) by Guy Jerome Ursery [18-1] with brief (1016) [Entry date 05/25/93]
5/24/93	30	PROOF of mailing of Government's Responses to Motions with Briefs (1016) [Entry date 05/25/93]
6/7/93	31	PROPOSED JURY instructions filed by plaintiff USA (1016) [Entry date 06/08/93]
6/15/93	32	REPLY by defendant Guy Jerome Ursery to motion response by USA

DATE	NR	PROCEEDINGS
		[28-1] with Affidavit and Proof of Mailing (1016) [Entry date 06/21/93]
6/16/93	33	MOTION by plaintiff USA to modify bond as to defendant Guy Jerome Ursery with proof of mailing (1016) [Entry date 06/22/93]
6/16/93	34	ORDER by Judge Stewart Newblatt granting motion to modify bond as to defendant Guy Jerome Ursery by USA [33-1] (1016) [Entry date 06/22/93]
6/16/93	35	ORDER by Judge Stewart Newblatt, setting unsecured bond in the amount of \$10,000.00 as to defendant Guy Jerome Ursery with conditions (1016) [Entry date 06/22/93]
6/16/93		MOTION hearing held as to defendant Guy Jerome Ursery on motion for evidentiary hearing by Guy Jerome Ursery [16-1], motion suppression of evidence by Guy Jerome Ursery [16-2] disposition: denied - Judge Stewart Newblatt - Court Reporter: Sprague (1016) [Entry date 06/22/93]

DATE	NR	PROCEEDINGS
6/18/93	36	GOVERNMENT's proposed WIT- NESS list by plaintiff USA (1016) [Entry date 06/22/93]
6/18/93	37	PROPOSED EXHIBIT list by plaintiff USA (1016) [Entry date 06/22/93]
6/21/93	38	NOTICE by defendant Guy Jerome Ursery of objection to foundation for government exhibits with proof of mailing (1016) [Entry date 06/24/93]
6/21/93	39	ORDER by Judge Stewart Newblatt granting motion to modify bond as to defendant Guy Jerome Ursery by USA [33-1], criminal jury trial (1016) [Entry date 06/25/93]
6/24/93	39	ORDER by Judge Stewart New-blatt denying motion to strike mandatory minimum sentence provision of 21:841(b) by Guy Jerome Ursery [18-1] denying motion for evidentiary hearing by Guy Jerome Ursery [16-1], denying motion suppression of evidence by Guy Jerome Ursery [16-2] mooting motion for disclosure of informant by Guy Jerome Ursery [17-1] (1016) [Entry date 06/25/93]

DATE	NR	PROCEEDINGS
6/25/93	40	ORDER by Judge Stewart New- blatt, reassigning case from Judge Stewart Newblatt to Judge Avern Cohn for the purpose of conducting trial proceedings and any other related matters. (1043) [Entry date 06/28/93]
6/29/93	41	WITNESS list by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93	42	EXHIBIT list by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93	3	JURY instructions (requested) filed by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93		VOIR DIRE begun and continued to 9:00 6/30/93 before Judge Avern Cohn - Court Reporter: Herman Tappert (1164) [Entry date 07/01/93]
6/30/93		VOIL DIRE bided before Judge Avern Cohn - Court Reporter: Her- man Tappert (1164) [Entry date 07/01/93]
6/30/93		JURY impanelment held before Judge Avern Cohn -Court Reporter:

DATE	NR	PROCEEDINGS
		Herman Tappert (1164) [Entry date 07/01/93]
6/30/93		CRIMINAL jury trial begun and continued to 9:00 7/1/93 for Guy Jerome Ursery - Judge Avern Cohn - Court Reporter: Herman Tappert (1164) [Entry date 07/01/93]
7/1/93		CRIMINAL jury trial held and continued to 7/2/93 for Guy Jerome Ursery - Judge Avern Cohn - Court Reporter: Herman Tappert (1079) [Entry date 07/07/93]
7/2/93		CRIMINAL jury trial concluded - Judge Avern Cohn - Court Reporter: Herman Tappert (1053) [Entry date 01/27/94]
7/2/93		JURY verdict, of guilty entered as to Guy Jerome Ursery (1) count(s) 1, defendant Guy Jerome Ursery referred to probation - Judge Avern Cohn - Court Reporter: Herman Tappert (1053) [Entry date 01/27/94]
7/7/93	44	VERDICT form as to defendant Guy Jerome Ursery (1043) [Entry date 07/08/93]
7/9/93	45	MOTION by defendant Guy Jerome Ursery for new trial with exhibits,

DATE	NR	PROCEEDINGS
		brief, and proof of mailing. (1043) [Entry date 07/13/93]
7/15/93	46	MOTION by defendant Guy Jerome Ursery for dismissal of the case with brief and proof of mailing. (1043) [Entry date 07/19/93]
7/20/93	47	RESPONSE by plaintiff USA to motion for new trial by Guy Jerome Ursery [45-1] with brief, exhibits, and proof of mailing. (1043) [Entry date 07/26/93]
7/30/93	48	STIPULATION and order by Judge Avern Cohn, allowing the USA additional time to respond to motion for dismissal of the case by Guy Jerome Ursery [46-1] (1043) [Entry date 08/03/93]
7/30/93		SCHEDULE: by Judge Avern Cohn deadline for response to motion for dismissal of the case by Guy Jerome Ursery [46-1] extended to 8/27/93 (1079) [Entry date 08/04/93]
8/25/93	49	RESPONSE by plaintiff USA to motion for dismissal of the case by Guy Jerome Ursery [46-1] with brief, exhibits, and proof of mailing. (1043) [Entry date 08/30/93]

DATE	NR	PROCEEDINGS
9/14/93	50	MEMORANDUM and order by Judge Avern Cohn denying motion for dismissal (judgment of acquittal) of the case by Guy Jerome Ursery [46-1], denying motion for new trial by Guy Jerome Ursery [45-1] with proof of mailing. (1043) [Entry date 09/16/93]
11/2/93	51	MEMORANDUM by plaintiff USA in support of Probation Department's adjustment in presentence report for possession of firearm as to defendant Guy Jerome Ursery with brief and proof of mailing. (1043) [Entry date 11/08/93]
1/19/94		SENTENCING held - Judge Avern Cohn -D/Atty: L. Emery - AUSA: M. Dayne- Court Reporter: Herman Tappert (1109) [Entry date 01/20/94]
1/19/94	52	JUDGMENT and commitment order entered by Judge Avern Cohn sentencing Guy Jerome Ursery (1) count(s) 1. (time stamped 1/20/94) (1043) [Entry date 01/27/94]
1/31/94	53	MOTION by defendant Guy Jerome Ursery for bond pending appeal with brief and proof of mailing. (1043) [Entry date 02/01/94]

DATE	NR	PROCEEDINGS
1/31/94	54	APPEAL by defendant Guy Jerome Ursery of judgment [52-2] to USCA - FEE: not paid (1045) [Entry date 02/01/94]
1/31/94	57	REQUEST by defendant Guy Jerome Ursery for transcripts of trial and pretrial motions (1045) [Entry date 02/01/94]
2/1/94	55	PROOF of mailing of notice of appeal to USCA, Lawrence J. Emery, Robert Haviland, Patricia Blake and Herman Tappert (1045) [Entry date 02/01/94]
2/1/94	56	CERTIFIED copy of appeal notice by Guy Jerome Ursery [54-1] and docket transmitted to USCA (1045) [Entry date 02/01/94]
2/9/94	58	RESPONSE by plaintiff USA to motion for bond pending appeal by Guy Jerome Ursery [53-1] with brief, attachment, and proof of mailing. (1043) [Entry date 02/15/94]
2/15/94	59	NOTICE of hearing on motion for bond pending appeal by Guy Jerome Ursery [53-1] set before Judge Cohn. (1043) [Entry date 02/16/94]

DATE	NR	PROCEEDINGS
2/15/94	60	ORDER by Judge Avern Cohn as to defendant Guy Jerome Ursery, extending time to surrender to institution. (1043) [Entry date 02/16/94]
2/15/94		SCHEDULE: by Judge Avern Cohn as to defendant Guy Jerome Ursery hearing on motion for bond pending appeal by Guy Jerome Ursery [53-1] set for 3:30 3/2/94 for Guy Jerome Ursery (1109) [Entry date 02/16/94]
2/18/94	61	TRANSCRIPT order form by defendant Guy Jerome Ursery requesting transcripts of: 6/16/93 before Judge Newblatt, court reporter Sprague and 6/29/93 - 7/2/93 before Judge Cohn, court reporter Tappert. All witnesses and entire trial transcript including judge's rulings on motions, objections; and rulings on jury instructionsappeal case # 94-1127 (1043) [Entry date 02/28/94]
2/18/94		DESIGNATION of record by defendant Guy Jerome Ursery - appeal case # 94-1127 (1043) [Entry date 02/28/94]

DATE	NR	PROCEEDINGS
2/23/94	63	ACKNOWLEDGEMENT from USCA, via copy of transmission form, of receipt of appeal notice by Guy Jerome Ursery [54-1] (stamped received by USCA 2/7/94 and stamped filed by USCA 2/11/94) - appeal case # 94-1127 (1043) [Entry date 03/03/94]
2/25/94	64	FEE payment received from defendant Guy Jerome Ursery for appeal notice by Guy Jerome Ursery [54-1] in the amount of \$105.00 - Receipt # 200 301506 - appeal case # 94-112 7. (2/28/94 - USCA notified by E-Mail) (1043) [Entry date 03/03/94]
3/2/9465		APPLICATION and order by Judge Avern Cohn for defendant Guy Jerome Ursery to proceed in forma pauperis regarding appeal filed 1/31/94. (#94-1127) (1043) [Entry date 03/03/94]
3/2/94		MOTION hearing held as to defendant Guy Jerome Ursery on motion for bond pending appeal by Guy Jerome Ursery [53-1] - disposition: GRANTED - Judge Avern Cohn - Court Reporter: Denise Mosby (1164) [Entry date 03/28/94]

DATE	NR	PROCEEDINGS
3/18/94		ATTORNEY added for Guy Jerome Ursery - by Order of the Court of Appeals (1016) [Entry date 03/31/94]
3/18/94	67	ORDER as to defendant Guy Jerome Ursery by the Court of Appeals appointment Lawrence J. Emery as counsel for appellant (1016) [Entry date 03/31/94]
3/21/94	66	ORDER by Judge Avern Cohn granting motion for bond pending appeal by Guy Jerome Ursery [53-1] (1043) [Entry date 03/22/94]
4/11/94	68	TRANSCRIPT of jury trial proceedings (Volume I) as to defendant Guy Jerome Ursery taken on 6/30/93 before Judge Cohn. (1043) [Entry date 04/14/94]
4/11/94	69	TRANSCRIPT of jury trial proceedings (Volume II) as to defendant Guy Jerome Ursery taken on 7/1/93 before Judge Cohn. (1043) [Entry date 04/14/94]
4/11/94	70	TRANSCRIPT of jury trial proceedings (Volume III) as to defendant Guy Jerome Ursery taken on 7/2/93 before Judge Cohn. (1043) [Entry date 04/14/94]

DATE	NR	PROCEEDINGS
4/11/94	71	TRANSCRIPT of sentence proceedings as to defendant Guy Jerome Ursery taken on 1/19/94 before Judge Cohn. (1043) [Entry date 04/14/94]
5/18/94	72	TRANSCRIPT of motions proceedings as to defendant Guy Jerome Ursery and before Judge Stewart Newblatt taken on 6/16/93 (1043) [Entry date 05/27/94]
6/2/94	74	AUTHORIZATION and voucher for payment of transcript to Lightning Recording Service in the amount of \$63.00 as to defendant Ursery. (1043) [Entry date 06/30/94]
6/2/94	75	AUTHORIZATION and voucher for payment of transcript to Herman Tappert, court reporter, in the amount of \$1,149.00. (1043) [Entry date 06/30/94]
6/6/94	73	TRANSCRIPT of motion for bond pending appeal proceedings as to defendant Guy Jerome Ursery taken on 3/2/94 before Judge Cohn. (1043) [Entry date 06/07/94]

DATE NR PROCEEDINGS

7/18/94

76 MOTION by defendant Guy Jerome
Ursery to supplement record for
appeal with brief, copies of exhibits,
and proof of mailing. (1043) [Entry
date 07/20/94]

7/18/94 77 ORDER by Judge Avern Cohn granting motion to supplement record for appeal by Guy Jerome Ursery [76-1]. (The District Court Clerk is directed to certify and transmit to the Court of Appeals for the Sixth Circuit the court file in USA -v- Certain Real Property located at 1700 Braden Road, file no. 92-cy-75843. The trial exhibits attached to the defendant's motion and a photograph of the government's, the defendant's motion and a photograph of government's exhibit 13 are to be made a part of the record for exhibit 13 are to be make a part of the record for transmittal.) (1043) [Entry date 07/20/94]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (DETROIT)

CIVIL DOCKET FOR CASE #: 92-CV-75843

UNITED STATES OF AMERICA

v.

REAL PROPERTY LOCATED AT 1700 BRADEN ROAD

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
9/30/92		Magistrate Judge Lynn V. Hooe Jr. (1065) [Entry date 10/01/92]
9/30/92	1	COMPLAINT for forfeiture, with WI (1052) [Entry date 10/02/92]
10/1/92	2	WARRANT for search and seizure issued as to 1700 Braden Road with attached application and affidavit. (1052) [Entry date 10/02/92]
10/7/92	3	CLAIM by Guy J. Ursery, Cynthia K. Ursery with proof of mailing. (1052) (Entry date 10/08/92]
10/8/92	4	WARRANT for search and seizure executed by Marshal on 10/2/92 as to

DATE	NR	PROCEEDINGS
		1700 Braden Road (1052) [Entry date 10/13/92]
10/23/92	5	ANSWER by claimant Guy J. Ursery, claimant Cynthia K. Ursery to complaint [1-1] jury demand and with proof of mailing (1052) [Entry date 10/26/92]
10/27/92	6	SUMMONS returned executed by US Marshal on 10/2/92 as to defendant RP 1700 Braden Road - answer due 10/22/92 for RP 1700 Braden Road (1052) [Entry date 10/30/92]
10/30/9	27	PRETRIAL scheduling order by Judge Lawrence P. Zatkoff (1052) [Entry date 11/02/92]
11/3/92		SCHEDULE: by Judge Lawrence P. Zatkoff scheduling conference set for 2:30 11/9/92 (1089)
11/13/92	8	PRETRIAL scheduling order by Judge Lawrence P. Zatkoff (1054) [Entry date 11/16/92]

	1	
DATE	NR	PROCEEDINGS
11/16/92		SCHEDULE: by Judge Lawrence P. Zatkoff deadline for interrogatories set for 12/21/92, deadline for filing motions set for 1/25/93, deadline for expert witness list set for 2/1/93, deadline for discovery set for 2/15/93, deadline for filing dispositive motions set for 3/8/93, deadline for final pretrial order set for 6/14/93, final pretrial conference set for 2:00 6/14/93, civil jury trial set for 8:30 7/1/93 (1089)
11/18/92	9	AFFIDAVIT of publication of complaint on 11/12/92 (1052) [Entry date 11/19/92]
12/10/92	10	ANSWER by claimant NBD Mtg Co to complaint [1-1] with exhibits (1052) [Entry date 12/11/92]
12/10/92	10	AFFIRMATIVE defenses by claimant NBD Mtg Co (1052) [Entry date 12/11/92]
12/10/92	11	APPEARANCE for claimant NBD Mtg Co of attorney Steven I. Alpert with notice. (1052) [Entry date 12/11/92]
12/10/92	12	PROOF of mailing of pleadings #10 & 11. (1052) [Entry date 12/11/92]

DATE	NR	PROCEEDINGS
12/11/92	13	CLAIM of interest by claimant NBD Mtg Co, with exhibits, verifi- cation, and proof of mailing. (1024) [Entry date 12/14/92]
12/15/92	14	PROOF of mailing of interrogatories. (1052) [Entry date 12/16/92]
1/26/93	15	MOTION by claimant Guy J. Ursery, claimant Cynthia K. Ursery to compel discovery with brief, exhibits and proof of mailing. (1052) [Entry date 01/27/93]
2/1/93	16	WITNESS list by plaintiff USA (1052) [Entry date 02/02/93]
2/11/93	17	ORDER by Judge Lawrence P. Zatkoff granting motion to compel discovery by Cynthia K. Ursery, Guy J. Ursery [15-1] with proof of mailing. (1052) [Entry date 02/02/93]
2/2/93	18	PROOF of mailing of plaintiff's witness list and answer to request. (1052) [Entry date 02/03/93]
2/2/93	19	TRIAL WITNESS list by claimant NBD Mtg Co with proof of mailing. (1052) [Entry date 02/03/93]

DATE	NR	PROCEEDINGS
2/4/93	20	WITNESS list by claimants Guy J. Ursery and Cynthia K. Ursery with proof of mailing. (1052) [Entry date 02/05/93]
2/19/93	21	STIPULATION and order by Judge Lawrence P. Zatkoff extending discovery date. (1052) [Entry date 02/22/93]
3/10/93	22	MOTION by claimants Guy and Cindy Ursery for evidentiary hearing, to dismiss with brief, attachments and proof of mailing. (1052) [Entry date 03/11/93]
3/22/93	23	NOTICE by claimants of hearing on motion for evidentiary hearing [22-1], motion to dismiss [22-2] with proof of mailing. (1052) [Entry date 03/23/93]
3/23/93	24	RESPONSE by plaintiff USA to motion for evidentiary hearing by Cynthia K. Ursery, Guy J. Ursery [22-1], motion to dismiss by Cynthia K. Ursery, Guy J. Ursery [22-2] with brief, and attachment (1024) [Entry date 03/24/93]
3/24/93	25	PROOF of mailing of answer to claimants' motion for evidentiary hearing. (1052) [Entry date 03/25/93]

DATE	NR	PROCEEDINGS
3/26/93	26	RE-NOTICE by claimants of hearing on motion for evidentiary hearing [22-1], motion to dismiss [22-2] with proof of mailing. (1052) [Entry date 03/29/93]
4/22/93	27	STIPULATED expedited SET- TLEMENT agreement (1052) [En- try date 04/23/93]
4/30/93	28	PROOF of mailing of Expedited Settlement Agreement (1052) [En- try date 05/03/93]
5/24/93	29	CONSENT judgment entered by Judge Lawrence P. Zatkoff for USA against Guy J. Ursery, Cynthia K. Ursery for \$13,250.00. (1118) [Entry date 05/25/93]
8/26/93	30	PROOF of mailing of consent judgment of forfeiture (1044)
11/22/94		RECORD consisting of: 1 volume(s) of pleadings 0 transcript(s) 0 deposition(s) transmitted to USCA record sent per order of 7/18/94 in case 4:93cr500l6 (#77) (1142) [Edit date 11/22/94]

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

No. 93-50016

HON, STEWART A. NEWBLATT UNITED STATES OF AMERICA, PLAINTIFF

GUY JEROME URSERY, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(manufacture of marihuana) (21 U.S.C. §841(a)(1)

That on or about July 30, 1992, in the Eastern District of Michigan, GUY JEROME URSERY did knowingly and intentionally manufacture marihuana, a schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

THIS IS A TRUE BILL.

Dated: 2-5-93

/s/ JANET J. SULZ JANET J. SULZ FOREPERSON

STEPHEN J. MARKMAN UNITED STATES ATTORNEY

/s/ MARL... DAYNE MARLENE DAYNE

(P33973) /s/ ROBERT W. HAVILAND Assistant U. S. Attorney

ROBERT W. HAVILAND (P25665)

600 Church St., Room 210

Asst. U.S. Attorney-in-

Flint, MI 48502

Charge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION - FLINT

CRIMINAL ACTION NO: 93-CR-50016-FL UNITED STATES OF AMERICA, PLAINTIFF

GUY JEROME URSEY, DEFENDANT

AMENDED SCHEDULING ORDER

At a preliminary hearing of the above-captioned matter held with the law clerk and all the parties, certain dates were set pursuant to the Speedy Trial Act, 18 U.S.C. § 3161. IT IS HEREBY ORDERED that the parties shall comply with the following dates:

Motion cutoff date:

April 2, 1993.

Plea cutoff date:

April 20, 1993.

Final pretrial date:

April 20, 1993; 1:30 p.m.

Jury trial date:

May 5, 1993; 8:00 a.m.

SO ORDERED.

Date: 3/18/93

/s/ STEWART A. NEWBLATT STEWART A. NEWBLATT United States District Judge

CERTIFICATION OF SERVICE

UNITED STATES OF AMERICA EASTERN DISTRICT OF MICHIGAN

CASE No: 93-50016

I, the undersigned, hereby certify that I have on the 18th day of March, 1993, mailed a copy of the AMENDED SCHEDULING ORDER in the foregoing cause, pursuant to Rule 77(d), Fed.R.Civ.P., to the following persons at the addresses given:

Marlene Dayne Assistant U.S. Attorney 206 Federal Building 600 Church Street Flint, MI 48502

Lawrence J. Emery, Esq. 3401 E. Saginaw Suite 104 Lansing, MI 48912-4730

/s/ COLETTE J. LEHOUX
COLETTE J. LEHOUX, Secretary
to Stewart A. Newblatt
United States District Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CASE No. 92 CV 75843 HONORABLE LAWRENCE P. ZATKOFF

UNITED STATES OF AMERICA, PLAINTIFF(S)

v.

REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, ET AL., DEFENDANT(S)

SCHEDULING ORDER FOR THE PURPOSE OF:

- Scheduling future proceedings;
- (2) Establishing deadlines and cut-off dates for discovery procedures, amendments to pleadings and joining parties;
- (3) Modifying motion practice; and
- (4) Referring certain pretrial matters to United States Magistrate Judge.

COUNSEL ARE ADVISED THAT IT IS THE POLICY OF THE COURT TO ENFORCE THE DEADLINES AND CUT-OFF DATES SET FORTH IN THIS SCHEDULING ORDER PURSUANT TO RULE 16(F), FEDERAL RULES OF CIVIL PROCEDURE.

SPECIAL NOTICE: Pursuant to Rule 16(b), Federal Rules of Civil Procedure, requests for modification of this Scheduling Order must be submitted in writing by mail to the Court within 14 days from the date of this Scheduling Order.

Pursuant to the Federal Rules of Civil Procedure, the Court enters the following schedule controlling the progress of the above-entitled cause:

IT IS ORDERED:

- 1. The deadline date for serving first set of interrogatories and/or requests for production of documents to a party, pursuant to Rules 33 and 34, Fedeal Rules of Civil Procedure is 12-21-92.
- 2. The deadline date for filing motions to compel with respect to such interrogatories and/or requests for production of documents to a party pursuant to Rule 37(a), Federal Rules of Civil Procedure, is 1-25-93.
- 3. Parties are ORDERED to exchange complete trial witness lists on or before 2-1-93 and file a proof of service. NO WITNESS MAY BE CALLED FOR TRIAL UNLESS THAT WITNESS'S NAME AND ADDRESS IS LISTED, unless the Court rules, prior to trial, that there was good cause for failing to list such witness.
 - 4. Case will be referred to Mediation Tribunal: n/a.

- 5. The discovery cut-off is 2-15-93, ALL DIS-COVERY SHALL BE INITIATED WELL IN AD-VANCE OF THE DISCOVERY CUT-OFF DATE. MOTIONS TO COMPEL, IF NECESSARY, MUST BE FILED AND HEARD BEFORE THE DISCOVERY CUT-OFF DATE.
- 6. Dispositive motions (summary judgment, etc.) if any, shall be filed by 3-8-93. (See comment below on motion practice.)
- 7. Motions in limine must be filed with the Court before the pretrial/settlement conference date. No motions in limine will be heard on day of trial.
- 8. The proposed pretrial order shall be submitted to the Judge's Chambers by 6-14-93. Instructions are attached. FAILURE TO SUBMIT A TIMELY PRE-TRAIL ORDER WILL RESULT IN THE ISSUANCE OF SANCTIONS.
- 9. FINAL PRETRIAL/SETTLEMENT CONFER-ENCE IS SCHEDULED FOR 6-14-93 AT 2:00 p.m. TRIAL COUNSEL MUST BE PRESENT, AS WELL AS THE CLIENTS AND/OR THOSE WITH FULL AUTHORITY TO ENGAGE IN SETTLEMENT NEGOTIATIONS.
- 10. JOINT jury instructions for jury cases, or individual proposed findings of act and conclusions of law for non-jury cases, must be submitted to the Court on the first day of trial. Trial briefs must be submitted at least 3 days before trial. (See Local Court Rule 39.2)

11. Parties are to exchange copies of all exhibits, or divulge and permit an opportunity to review exhibits not capable of being copied, at least 20 days prior to the month in which the case is scheduled for trial.

All proposed exhibits are to be jointly premarked and indexed.

In jury cases, the Court shall be furnished with a copy of all proposed documentary exhibits IN BINDERS with a typed index. In non-jury cases, the Court shall be furnished with two (2) copies of all proposed documentary exhibits IN BINDERS and two (2) typed indexes.

12. All depositions shall be edited prior to the Final Pretrial/Settlement Conference date. The Court will not hear any motions or objections regarding the content of depositions after the Final Pretrial/Settlement Conference.

13. The case is assigned for Jury trial on the Court's trailing docket for July, 1993.

14. When <u>each</u> attorney for <u>each</u> party in any suit desires an early trial date and will dispatch all pretrial motions, this Court will assure the earliest open date for trial. Call Ms. Thebolt, Court Clerk at (313) 226-3714.

QUESTIONS CONCERNING THIS SCHEDULING ORDER SHOULD BE DIRECTED TO THE COURT'S COURTROOM DEPUTY CLERK, BERNADETTE THEBOLT, AT 226-3714.

MOTION PRACTICE

Counsel are expected to comply with Rule 7.1, Local Rules of this Court, including the requiring of filling responses and briefs with Ten (10) days after service of motion.

Oral arguments on motions will not be held unless, upon consideration, the Court so orders. If the Court does order oral argument, reasonable notice of a date and time will be given to all counsel. E.D. Mich. Local R. 7.1(e)(2).

Date: Nov. 13, 1992 /s/ LAWRENCE P. ZATKOFF
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT
JUDGE

NOTICE TO:

Joyce F. Todd, AUSA

Lawrence J. Emery, Esq.,

STATE OF MICHIGAN JUDICIAL DISTRICT

POLICE AGENCY REPORT NUMBER: 7-3036-92 AFFIDAVIT FOR SEARCH WARRANT

Thomas B. Feahr, Affiant(s), state(s) that:

1. The person, place or thing to be searched is described as and is located at:

A one story, brown wood sided ranch style home with attached garage and all outbuildings and vehicles located at 1700 Braden Rd., Perry, MI 48872 and further described as the first residence on the south side of Braden Rd., just east of State Rd., section 32 of Antrim Twp., Shiawassee County.

The PROPERTY to be searched for and seized, if found, is specifically described as:

All evidence of narcotics and narcotics trafficking including any items recognizable as narcotics or suspected of being same, any records suspected of being related to narcotics trafficking, records establishing residency, control or ownership of premises, any currency believed to be the proceeds of drug transactions, firearms or weapons used to protect the controlled substances or the proceeds from the sale of the controlled substances, any drug paraphernalia, any utility and telephone records, and any items used for manufacturing marijuana or other illegal drugs.

- 3. The FACTS establishing probable cause or the grounds for search are:
 - A. Affiant is a Detective/Trooper with the Michigan state police and has been a police officer for over five years. Affiant has been assigned Criminal Investigation Division to investigate illegal narcotic trfficking in the Shiawassee County area for over one year. Affiant has extensive specialized training in the area of enforcement.
 - B. Affiant was contacted by Officer Chester Farrier of Morrice Police Dept. Farrier advised Affiant that he has a informant that has been proven reliable. Farrier advised Affiant the informant told him the following:
 - A person named Guy Ursery resides at 1700 Braden Rd., Perry and he has a son named Brian Ursery.
 - 2. Informant has known Guy Ursery for several years.
 - 3. Informant has personally observed that Guy Ursery grows marijuana on his property that the residence occupies.

This affidavit consist of 2 pages. /S/ D/trr/ THOMAS (illegible)
Affiant

Reviewed on [July 29, 1992]
Date

Subscribed and sworn to before me on [7-29-92]
Date

by: DEANA M. FINNEGAN
Prosecuting Official

By

BART J. BARNES Judge/Magistrate

- Informant stated that Ursery first starts marijuana seedlings in a chicken coop and then transplants the immature plants on his property.
- That Ursery dries marijuana on a woodpile at the residence.
- That Ursery stores marijuana in a crawl space inside the residence.
- 7. That Ursery uses chicken wire to surround the growing marijuana plants to keep animals from eating the immature plants.
- 8. That Ursery has used the same growing methods and pattern every year.
- That Ursery has numerous firearms, including firearms kept under his bed, a loaded firearm near the fireplace of the residence.
- 10. Ursery has told the informant that he would shoot anyone found on the property. Ursery told the informant if you are going to shoot a cop, then shoot him in the head.
- C. Affiant was advised by Farrier that the informant could draw a map of Ursery's property showing the locations of marijauna being grown.
- D. That on 06-22-92 the informant did in fact draw a map of the property for Farrier. Farrier did locate a residence at 1700 Braden Rd.

- E. Affiant did personally verify through Secretary of state and vehicle records that Guy Ursery does live at 1700 Braden Rd. Perry, and that there is a Brian Ursery shown as residing there also.
- F. That Affiant and Farrier did personally drive by the residence located at 1700 Braden Rd., Perry and the map closely resembled the actual property layout.
- G. That on 07-27-92 Affiant and Farrier walked onto the property described on the informants map. Affiant and Farrier verified the map as being accurate by using landmarks drawn by the informant.
- H. That Affiant and Farrier did locate at least three plots of suspected marijuana in the location described on the map. These plots were surrounded by chicken wire as described by the informant. Two plots held approximately nine plants each and one plot held approximately twenty five plants.
- I. That Affiant did seize one plant from the plot and Affiant believed the plant to be marijuana. This plant was seized on the same date of 07-27-92.
- J. That Affiant personally delivered the seized plant to Laboratory expert Phyllis Good at the MSP Crime Lab, and that Phyllis Good conducted a cursory examination of the seized plant and verified that the plant was indeed marijuana.

Whereas the Affiant has personally verified information received from the informant and believes the

informant to in fact be credible and reliable based on the foregoing information, and Affiant has reasonable and probable cause to believe, and does believe, that the above described premises contain evidence of violations of criminal statutes of Michigan, and therefore requests the court issue a warrant directing any officer of the State of Michigan to search the place described above and to seize those items described above and to make return and tabulation thereof according to law.

Further the Affiant sayeth not.

[<u>7-29-92</u>] Date

/s/ BART J. BARNES
J. BARNES
Judge/Magistrate

UNITED STATES OF AMERICA UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CASE No. 93-CR-50016 HONORABLE AVERN COHN

UNITED STATES OF AMERICA

vs.

GUY JEROME URSERY, DEFENDANT

TRIAL EXCERPTS

APPEARANCES:

MARLENE A. DAYNE, ESQ. Assistant United States Attorney 206 Federal Building 600 Church Street Flint, Michigan 48502

Appearing on behalf of United States of America.

LAWRENCE J. EMERY, P.C. Point North Professional Center Suite 104 3401 East Saginaw Lansing, Michigan 48912

Appearing on behalf of Defendant Guy Jerome Ursery.

[87]

[Excerpts from Trial Testimony of Heather McPherson, Tr. 134-186]

[134]

HEATHER McPHERSON,

having been first duly sworn, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MS. DAYNE:

Q Please state your full name and spell your last name.

A My name is Heather Ann McPherson. Do you want me to spell my last?

Q Yes.

[135]

A M-c-P-h-e-r-s-o-n.

Q How old are you?

A I am 20.

Q Are you currently employed?

A Yes, I am.

Q Where are you working?

A At Ewell (ph.) Barber Shop in Perry, Michigan.

Q Do you know someone named Brian Ursery?

A Yes, I do.

Q How and when did you meet?

A I met him in 1988 or '89.

Q How did you happen to meet him at that time?

A He was a new student at my high school.

Q Was that in Perry?

A No, in Morris.

Q And what was your relationship with Brian Ursery?

A He was my boyfriend for about three years.

Q When did you start dating or start calling him your boyfriend?

A On April 7th - September 7th of '89.

Q And at some point you broke up?

A Yes, in February of '92.

Q Now, during that time that you and Brian were boyfriend and girlfriend, where did Brian live?

A He lived at 1700 Braden Road in Perry, Michigan.

[136]

Q And about how many times were you in the Ursery's house at 1700 Braden Road?

A Several times.

Q Could you give us approximately a number or how often?

A Almost every day of the week.

Q What is your relationship with Brian today?

A We were friends, but I don't think we are any more.

Q Do you know Brian's father, the defendant, Guy Jerome Ursery?

A Yes.

Q Do you remember when you first met him?

A I met him about two weeks after I started going with Brian.

Q September '89 that would have been?

A Yes.

Q Now, was the defendant also living at 1700 Braden Road?

A Yes, he was.

- Q About how much property did the defendant own?
 - A About ten acres.
- Q Did anyone else live there besides the defendant and Brian?

A Yes, the defendant's wife, Sandy Ursery.

Q Do you know approximately how long he had lived at 1700 Braden Road as of this date?

A Yes, probably about four or five years.

Q And about how far away from the Ursery's house is the next closest house?

[137]

A About a quarter of a mile.

- Q And a quarter mile away, how many houses are there?
 - A Just one.
- Q And then after that house, how close would the next house be?
 - A About a mile.
- Q Have you ever seen marihuana plants growing at the defendant's house?

MR. EMERY: Objection, your Honor, without an indication of time, time limits.

THE COURT: I suppose this is a prefatory question.

Go ahead.

Q (By Ms. Dayne): Have you ever seen marihuana plants growing at the defendant's house?

A Yes, I have.

Q And when was that?

MR. EMERY. Objection, your Honor, basis for her knowledge that it was on this property which she has testified to.

THE COURT: Well, okay, wait a second.

That's a rather general question, Counsel.

MS. DAYNE: I am going to go into detail.

THE COURT: Well, in the house or out of the house.

Q (By Ms. Dayne): Did you see marihuana plants growing inside or outside of the defendant's house?
[138]

A Both.

Q And when was the first time you saw this?

A It would have been the second summer that I dated him, which would have been '91 — or '90.

MR. EMERY: Objection, your Honor. It's irrelevant.

THE COURT: Well, there is no pending question. Let's see where we go.

Q (By Ms. Dayne): Okay. You started to go out with Brian in September of '89?

A Yes.

Q And you said the second summer after you started going out with him?

A Yes.

Q So when would that have been?

A It would have been '91.

Q And the first time you saw marihuana plants, where specifically did you see them?

A The first time I saw them?

Q Yes.

A They planted them in little plastic crates and put them out on a pallet in their back yard.

Q Well, how far from the house would that have been?

A How far would the pallet have been?

Q Yes, where the plants were.

[139]

A About half the length of a football field.

Q Now, did you ever see the defendant or anyone else do anything to take care of those plants?

A Yes, I did.

Q Who did you see do something?

A They all participated.

Q Who do you mean by "they al!"?

A Cindy, Jerry and Guy.

Or Cindy, Jerry and Brian,

Q During the time that you were going with Brian, did you call the defendant Jerry?

A Yes.

Q Did his friends call him that?

A Yes, that's what everybody calls him.

Q Okay. So if you during the testimony say "Jerry," you mean the defendant?

A Yes.

Q Just so we understand.

Okay, and what you said you saw the defendant, his wife and his son do something to take care of the plants: What did you see them do?

A They watered them. They would cover them up partial time of the days so that they wouldn't get too much sun or they wouldn't get frost out at night.

MR. EMERY: Objection as to the time, your Honor, when this was observed.

[140]

THE COURT: You'll have a right to cross-examine.

MR. EMERY: Thank you, Judge.

THE COURT: Go ahead.

Q (By Ms. Dayne): Do you know where the defendant got the marihuana seeds to start these plants?

THE COURT: Just yes or no.

A No.

Q (By Ms. Dayne): Did the defendant ever tell you where he got the seeds?

A No.

Q Now, these let's call them seedlings, how big were they when you first saw them?

A Oh, I don't know, not very big. They were just

coming up.

Q Did you see that those seedlings were ever transplanted?

A I wasn't present when they were transplanted, no.

Q Do you know if they were?

A Yes.

MR. EMERY: Your Honor, I object. She's not competent to give an opinion.

THE COURT: Well, wait, Counsel.
MR. EMERY: No, she is testifying—

THE COURT: But there is no pending question. She said she did not see them transplanted. There is no pending question.

[141]

MR. EMERY: Well, I think the next question, your Honor, is "were they transplanted" and she said, "Yes."

THE COURT: Well, we don't know that. You'll have an opportunity to cross-examine.

Go ahead.

Q (By Ms. Dayne): Did you see the marihuana plants in a different location?

A Yes.

THE COURT: Well, wait a minute. Did you see those that were on the pallet or did you see marihuana plants in a different location. There is a distinction.

Q (By Ms. Dayne): Did you see those marihuana plants that you had seen on the pallet, did you see those in a different location at any time?

A Well, I was told they were the same ones, yes.

MR. EMERY: Objection.

Q (By Ms. Dayne): Who told you that?

MR. EMERY: Hearsay. Objection, your Honor.

THE COURT: Mr. Emery, you've got to wait. She's being asked. It depends upon who told her whether or not it is hearsay.

MR. EMERY: Agreed. THE COURT: Go ahead.

Q (By Ms. Dayne): Who told you that?

A The defendant and the defendant's son.

[142]

Q Where were these marihuana plants when you saw them later?

A Out in the fields by their house.

Q Did you know at the time who owned that property where the plants were?

A I assumed they did.

Q Why did you assume that?

A Because they used that property.

Q About how many times did you see the marihuana plants in the ground on that property?

A About five times.

Q Did somebody take you out to show you those plants?

A Yes.

Q Who did that?

A The defendant's son.

Q About how far from the house were these marihuana plants growing?

A I'd say about a hundred yards.

Q When you were out at the marihuana plants, if you looked back in the direction of the house, could you see the house?

A Yes.

THE COURT: This is all the summer of '91, right?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q (By Ms. Dayne): About how many times did you see those plants while they were growing?

[143]

MR. EMERY: Objection. Both asked and answered, your Honor.

THE COURT: I believe she has already answered that.

Q (By Ms. Dayne): The first time you saw the plants growing, about how tall were they?

A Oh, they were, oh, about two or three inches—two or three feet high.

Q And about how many plants were there? What configuration were they in?

A As in how many were in each plot?

Q How many plots were there and how many plants in each plot.

A There were about five plots, and I'd say about a dozen to each plot.

Q Was there any kind of fencing around each plot?

A There was one that I remembered that had, like, chicken wire around one of them.

Q And what did the land look like that surrounded these marihuana plots?

A Mowed down.

Q Tell us more specifically what was mowed?

A The grass, the weeds that went to the plants was moved by the people, by the defendant and his son. They moved it.

Q They moved around the plants?

A They moved a path to get to it and around the plants.

Q How do you know-

[144]

MR. EMERY: Excuse me, your Honor. She should tell us the foundation, if she had personal knowledge.

THE COURT: Well, wait. You will have an opportunity to cross-examine her.

Go ahead, Counsel.

Q (By Ms. Dayne): How do you know that they moved around the plants?

A Because I was there and I know. I was there and I know.

THE COURT: Well, wait. Now, you can't just say you know. Did you see somebody with a mower or scythe?

THE WITNESS: Yes, a mower. A Ragmonier (ph.) which belonged to her, to Cindy's father.

Q (By Ms. Dayne): Now, outside the areas that were mowed, the paths around the marihuana plants, what did that area look like?

A Around where the plants were? Outside them?

Q Outside.

A All leafy.

Q And trees?

A Yeah.

Q Now, the last time, I believe you said you saw these plants several times that summer. The last time you saw those plants, how big were they?

A Taller than me.

Q Now, during that summer of '91, did you ever see the [145] defendant with a marihuana plant or part of a plant that had been pulled?

A Yes.

Q What did you see and where?

A One day the defendant came in the house and said that a piece of one of his plants fell out and he was going to put it in the freezer to save it.

Q And did you see him put it in the freezer?

A Yeah, it was in the garage the day that he did that.

Q Was there any other time you saw the defendant come in the house with a plant or part of a plant?

A No, because I wasn't there when they harvested them.

Q Did you ever see the defendant put a marihuana plant or part of a plant in the oven or microwave?

A Yeah.

MR. EMERY: Object to the leading nature of the question, your Honor.

Q (By Ms. Dayne): When was that? THE COURT: No, no, another time.

Q (By Ms. Dayne): When did you see that?

A September sometime maybe.

Q And what did you see this defendant do?

A He took a bud that he had and he wanted to smoke it, and it wasn't dry so he put it in the microwave to dry it out.

Q And you saw him do that?

[146]

A Yes.

Q And did you see him take it out of the microwave?

A Yes.

Q And what did he do then?

A He cut it up and he rolled it in papers and then he smoked it.

Q Do you know if these marihuana plants were ever harvested?

A Yes, I do.

Q How do you know that?

A Because one day I called the defendant's son because he was supposed to come to my house, and he couldn't come because he had to help his dad pull plants.

MR. EMERY: Well, objection, your Honor.

THE COURT: That would be hearsay, wouldn't it?

MR. EMERY: Yes. MS. DAYNE: Yes.

THE COURT: It would be based upon what the son told her.

MS. DAYNE: The son and the wife were coconspirators, your Honor. She has testified that they would both help take care of these plants.

THE COURT: They are not charged.

MS. DAYNE: That's right.

THE COURT: I'll allow the testimony.

MR. EMERY: All right.

[147]

Q (By Ms. Dayne): Do you know what happened to the marihuana plants after they were pulled?

A Yes, I do.

Q What happened to those plants?

A They were taken into the defendant's home in a crawl space and hung by hooks.

Q Did you see them there?

A Yes, I did.

Q How did you happen to see them there?

A They showed them to me.

Q Who do you mean by "they"?

A The defendant.

Q And how did you get into this crawl space?

A When you go into the house there is a master bedroom to the left, and there is also a closet behind the master bedroom door, and in that closet there is a door on the floor that you pull up and that is the entrance to the crawl space.

Q Who sleeps in that master bedroom?

A The defendant and his wife.

Q Now, did you actually go down in the crawl space? How did you see what was down there?

A I laid on the floor and put my head down to look.

Q And what exactly did you see?

A Marihuana plants hanging from hooks upside down.

Q Was there any light down there that allowed you to see [148] this?

A Yes, there was. There was a purple, I guess they call them grow lights, with—and they had aluminum foil spread out around down in the crawl space. And they had this light on all the time.

Q Why do you say it was on all the time?

A Well, because in one of their bathrooms that you go into there is a vent, and in that vent you can see the light from the bathroom vent.

Q Sort of back in the floor, you mean?

A No, it's in the wall, but you can see it shining up because it's from that point up.

MS. DAYNE: May I approach the witness, your

Honor?

Q (By Ms. Dayne): I have handed you Government's Exhibit Number 16. What is that a photograph of?

A The entrance to the crawl space in the defendant's home.

Q Now, do you know what happened to this marihuana that you saw in the crawl space after it was dried?

A They smoked it.

Q Who did you see smoke it?

A Jerry and—or Guy and his friends, and sometimes the defendant's son.

Q Did you ever smoke it with them?

A Yes, I did.

Q Do you still smoke marihuana?

[149]

A No, I don't.

Q You know it's illegal, right?

A Yes, I do.

Q Why did you smoke with them?

A I don't know.

Q When you went into the defendant's house, and I'm talking about this whole time that you went with Brian, was there any time that you were in the house that you could smell marihuana in the house?

A Yeah.

Q When could you smell it?

A Whenever they smoked it. Whenever you walked into the house.

Q About how long would that have been? You said you were in there almost every day.

A Every day.

Q Did you ever see any firearms at the defendant's house?

A Yes.

Q Where did you see firearms?

A They kept one, it was either by the fireplace all the time or the back door all the time.

Q Was this a long gun?

A Yeah, it was like a rifle or something like that.

Q Do you know if that gun was loaded?

A Oh, yeah.

[150]

Q How did you know it was loaded?

A Because one day we saw a frog in the back yard and we shot at the frog, and I asked how come they kept it loaded and they said for trespassers.

MR. EMERY: Objection, your Honor.

THE COURT: I must hear a basis for it now to be able to admit this under an exception to hearsay.

MR. EMERY: Well, I just-

THE COURT: You're not asking your questions in short enough phrases.

Let's go ahead.

Q (By Ms. Dayne): Do you know Officer Chester Farrier of the Morris Police Department?

A Yes, I do.

Q Did you tell him about what you just testified?

A Yes, I did.

Q Did you describe to him where the marihuana plots were?

A Yes.

Q And did you assist in making a diagram showing where the actual marihuana plants were growing?

A Yes, I did.

Q Did you actually draw the diagram?

A No, a friend of mine drew it because I am not a good drawer.

Q And this diagram was made before the search warrant was [151] executed on July 30th?

A Yes.

Q Approximately when was the first time you ever spoke to anyone from the State Police about his case?

A Um, after, after the search warrant was-

Q Executed?

A Yeah, executed.

Q Okay. Well, approximately how long after, a month, two months, a year?

A A month.

Q And do you remember who you first met with?

A Yes, I do.

Q Who was that?

A Mike Pifer and Frank Secido.

Q And you talked to them about this case?

A Yes.

Q And did they give you any money?

A Yes, they did.

Q Do you remember how much money they gave you?

A Two hundred dollars.

Q Did they tell you why they were giving you that money?

A To pay for any inconvenience or expenses.

Q Was there another time that they gave you money?

A Yes.

Q Do you remember when that was?

[152]

A It was in February when I went to testify in front of the Grand Jury.

Q Do you remember how much you got that time?

A I got a hundred dollars.

Q And was there another time?

A Yes.

Q Do you remember when that was?

A Last month on the 16th, I think, when I went to review my testimony.

Q Was that when you came to my office?

A Yes.

Q And how much money did you get then?

A Two hundred dollars.

MS. DAYNE: I have no other questions, your Honor.

CROSS-EXAMINATION\

BY MR. EMERY:

Q Good afternoon, Ms. McPherson.

A Good afternoon.

Q We've never met before, is that right?

A That's right.

Q And you haven't had anyone representing Mr. Ursery ask you any mestions before, have you, about what you know about Mr. Ursery?

A No.

Q All the questions that have been asked you so far are [153] questions asked you by police officers and the United States Attorney?

A Yes.

Q Including at the Grand Jury. Maybe a Grand Juror asked you a question?

A Yes, a Grand Juror asked me a question.

Q All right. But today nobody has asked any questions who represents Mr. Ursery's interests, is that correct?

A No, sir, that is correct.

Q My understanding is that in the calendar year 1992 you didn't see anything growing in Mr. Ursery's home or adjacent property or anything; is that a fair statement?

A That is a fair statement.

Q The only information that you are giving the jury today is about something you saw in 1990 or '91?

A That's right.

Q You have no trouble remembering what you heard, is that right?

A Well, all of it was '91.

Q You think it was '91?

A I know it was '91.

[163]

Q Do you know whether or not the Urserys built the home that is located there at 1700 Braden Road?

A They didn't build it. They had a contractor build it.

Q Well, okay. But it was a newly-built home, wasn't it?

A Yes.

Q And have you lived out in that area for most of your young life?

A Yeah, all of my life.

Q Okay. Did that area where this house was built, prior to it being built, was there any homes or

anything in that area? Do you understand what I mean?

A In the area that their house was or on that road in [164] particular?

Q In that particular area where their house now is.

A No, it was an all-wooded area.

Q So someone threw in an cleared out an area for a house and they built a house there?

A Yes.

Q And you observed that in progress during the years that you were out there?

A Yes.

Q And did someone clear out the telephone poles in there so they could have utilities to the house?

A I don't know that much about it now.

Q Was your understanding though that it was all woods in that area prior to building the house?

A Yeah, all my life it was up until that point.

Q Do you have access to that property from locations other than the driveway and the yard immediately surrounding the house?

A Yeah, but it's really thick wood. I don't you'd be

able to get it through very good, no.

Q Okay. You said that you drew a map, that you had a friend draw a map?

A Yes.

Q Is that right?

[165]

By the way, do you know who owns the property

that surrounds the Ursery's property?

A Just in the back field and on the interfacing opposite of Braden Road. The back field and the field next to it is a friend of ours names Nanasy's.

Q They are friends of yours, are they?

A Yes, friends of our family.

Q I show you what has been marked as Defendant's Exhibit F. Would you look at that, please?

Can you identify that?

A Yes.

Q What is that?

A That is the diagram or the map that my friend wrote or drew of their property.

Q And you gave the person directions to draw the map?

A Yes.

She had been on that property before too.

Q Okay. And this map you drew to be accurate, you were going to give it to a police officer; is that correct?

A Right.

Q Is this map an accurate representation of that property?

A Well, from an amateur point of view I assume

that it is.

Q From an amateur?

A Yeah, we are not artists.

Q Does the Ursery property border State Road on the west?

[166]

A Not that I know.

Q Does this map indicate to you that the property is bordered on the west by State Road?

A Yeah.

Q That's funny?

A But it's only 'cause it'd been raining and it wasn't measured out. We didn't measure any portion of the-

Q Did you measure the hundred yards you claim the plots were from the house?

A No, that was just a rough estimate, out of my own thinking.

Q Okay. And you were going to give this to the police, weren't you?

A Yes.

Q You did give it to them as an accurate

representation of what the property was?

A No, I gave it to them as a-as kind a go-for. I didn't-It wasn't supposed to be like perfect to a T. 25 yards here and 25 yards there. It was just, like I said, an amateur drawing of a map.

Q I want you to look at Exhibit H that has been admitted into evidence in this case, Ms. McPherson.

Have you ever seen that photograph before?

A No.

Q Does that represent anything that you are familiar with?

A Yes, this is State Road and Braden Road.

[167]

Q Okay.

Do you see the Ursery property?

A Yeah.

Q Do you know where their property ends on the western boundary in the photograph?

A I can't say that I do.

Q It doesn't end at State Road, though, does it?

A No, because there's field over here, and I know whose property that is.

Q That's Mr.-

A Nanasy.

Q Nanasy's property.

Did you ever see Mr. Nanasy out in the field adjoining the Ursery property in 1991?

A Or doing what?

Q Did you see Mr. Nanasy out in the field with some relative of his?

A Andy went out in the field to do his harvesting and stuff like that.

Q He was out there frequently?

A Well, same as any normal farmer would be.

Q Did you ever see traffic up and down Braden Road when you were at the Ursery home?

A Yeah, but not very often.

Q Did you ever see any cars parked on Braden Road to the west [168] of the Ursery property before you got to State Road?

A Not to my recollection.

Q I'm talking about this area here.

A Parked?

Q Yeah, like alongside the road.

A Not to my recollection, no.

Q You never saw that. All these years that you were with Brian McPherson.

A No, they used—I saw them parked down State Road.

Q You saw them parked over here?

A Yes.

Q Okay.

A Yeah.

Q Before this property, the home was built on this property, did kids use this property, teenagers?

A The people who lived down that way just took over the woods. The young kids in the area would go down in the woods.

Q To have a bonfire and-

A No, no. We were really young. We would go and carve in the trees and stuff like that.

Q Okay. You don't know if there was any party or whether there was a party there before?

A. No, I was real young.

Q Now, the Nanasys are your friends; is that right?

A Yes.

[169]

Q Good friends?

A Yeah.

Q Looking at your testimony and talking about seeing things happen, and you use the word "they"; is that correct?

A Yeah.

Q You are saying not just Mr. Ursery but other people were involved in doing some things with respect to the marihuana that you saw in '91? A Pardon me.

Q Okay. Are you telling us that you saw people other than the defendant who is on trial in this case doing something with respect to the marihuana that you saw in 1991?

A Yes.

Q And those people were who?

A The defendant's wife and son.

Q Was there ever anyone else?

A Yeah, me. I carried a bucket of water out one day.

Q This is '91?

A Yes.

[179]

Q Did anyone tell you that the marihuana plots that they found [180] in 1992 were not on Ursery property?

A Yes.

Q Who told you that?

A The State Police and Marlene.

Q Did anyone tell you that this map that you helped compose and give to the police was not accurate?

A No. I had heard that it was pretty much accurate.

Q Oh, that's what they told you?

A Yeah.

Q Did they ask you, "Well, gee, this isn't Braden Road and State Road over here in the corner of the property"? No one said that to you?

[185]

Q Okay. Let me see if I understand what your

testimony is today.

Your testimony is that sometime after you and Brian Ursery broke up in 1992 you got into a conversation with Chester Farrier, a police officer of the City of Lawrence, and told him about marihuana growing on the Ursery property; is that correct?

A That's correct.

Q The reason for you and Brian breaking up is all your idea or his?

A Mine.

Q This was your breakup?

A Yes.

Q You wanted to break up?

A Yes, it was,

Q And then, has what you told the Government included this map, Exhibit A of the-excuse me, Exhibit F for the defense?

A Yes.

Q And then you have testified about information that you [186] observed in 1991, not 1992; is that correct?

A Yeah.

[Excerpt from charging conference, Tr. 289-292] [289]

THE COURT: You are asking for an instruction on the charge of simple possession?

MR. EMERY: That's correct, Judge.

I have such instruction prepared for that offense.

[290]

MS. JUHASZ: I oppose that request, your Honor. That is the first I have heard of it, so I didn't have the time to research it.

But my recollection of the research that I have done before indicates that it is not appropriate in a case such as this, when the evidence is so overwhelming, that he either planted those marihuana plants or he did not.

Certainly I guess you could look at possession as a part of the charge of the marihuana plants. It is a constructive possession of the plants he was growing, but I don't believe that the charge of simple possession of marihuana is adequately described by the evidence that we have seen in this case.

MR. EMERY: Judge, it is my position that we have indeed had evidence from which the jury could infer possession of marihuana; and it is for that reason alone that I ask for the instruction.

THE COURT: Well, you see, the trouble is here that possession or marihuana is really possession at the end of the manufacturing process. I have not researched this myself, but it seems to me that the charge includes the fact of marihuana in useable form.

The marihuana here that he is charged with manufacturing is not in useable form. It's not any of the marihuana that was found in the house. It's not any—Indeed, [291] no useable marihuana was found in the house.

To my recollection there were some seeds and there were some cigarette butts that assayed out as marihuana, but I don't recall any testimony that there was, I guess to use the vernacular, grass in smokeable form, that did not require some further processing.

MR. EMERY: Judge, the only thing I can see is Exhibit 13, which does contain some leafy material, and that is —

THE COURT: The leafy material wasn't analyzed.

MR. EMERY: I think it was.

THE COURT: Was it?

MR. EMERY: Yes, that's part of Exhibit 7.

THE COURT: Yes, but that's not what the charge is.

MR. EMERY: I agree with that.

THE COURT: That's not what the charge is.

And the Government isn't going to suggest that he can be convicted on anything found in the house.

Now, let me suggest this to you: If, after the conclusion of the argument—

MR. EMERY: I will not mention it in my argument, then.

THE COURT: All right.

If, after the conclusion of the Government's argument, first of all, if the Government intends to suggest that anything in the house can be used to convict per se, then I'll [292] see where we go. It is my understanding that the Government is going to argue that the manufacture of the plants that were in the field, and that's not possession of marihuana.

MR. EMERY: The only cases that I could find, Judge, were situations where we have had possession with intent to distribute or distribution of marihuana.

THE COURT: That's right, And there is no charge here of possession with intent to distribute.

Indeed, one of the interesting aspects of this case is the Government has made no effort to suggest that he wasn't going to use this for his own purposes.

MR. EMERY: Judge, may I take up a further matter

with the Court?

THE COURT: No, I am going to give the instruction at this time.

MR. EMERY: Thank you, Judge.

[Excerpt from Prosecutor's Rebuttal Summation, Tr. 334-335]

[334]

The defense spent most of his time during this trial trying to make a big issue that the plants weren't on

the defendant's property.

If you recall, when we started this trial on Tuesday, the Government right from the very beginning, my opening statement, I didn't say these plants were on the defendant's property. That issue has never been in dispute. The Government later learned that it was on property adjacent to the defendant's property. The plants were within 25 feet of his property. The Government presented no evidence to show that [335] those plants grown on land titled by the defendant.

And if you recall, when Mr. Emery was crossexamining Sgt. Feahr and implying that it was somehow improper that he didn't do more to find out who owned that property, Sgt. Feahr said that the titleowner of that land was not important to him. And likewise it should be of little or no importance to you as you examine the evidence in that trial.

Recall what one of the defense witnesses said. John Boggs said it's common for people who illegally grow marihuana to plant it on adjacent, abandoned property. The defendant is not stupid. It's not surprising the plants were not on land that he owned. It's much smarter for him to go just over the property line onto the vacant land next door. Close enough that he could cultivate them, keep an eye on them, guard them but safely on land owned by someone else. So that if the police found them, discovered these plants, the defendant could say, "Weren't on my land."

[Excerpt from Jury Instruction, Tr. 360-361]

You have heard testimony which, if believed, would suggest the defendant may have been involved in the commission of crimes, wrongs or acts not charged in the indictment.

The defendant was not on trial for any charge other than that set forth in the Indictment.

However, the law permits evidence of other crimes, wrongs or acts to be considered by a jury for certain limited purposes. This evidence has been admitted in this case for such limited purposes relating to the charges contained in Count 1 of the Indictment.

Testimony relating to such other crimes, wrongs or acts may only be considered by you in connection with the question of a defendant's identity, knowledge, plan or common scheme regarding the charge contained in the Indictment. You [361] must first determine from all of the other evidence in the case whether you are satisfied beyond a reasonable doubt that the defendant did the act charged in the Indictment. If you do so find you may then, and only then, consider testimony regarding acts not charged

in the Indictment in determining whether in doing the act charged in the Indictment the defendant had an identity, knowledge, plan or common scheme in regard to the charge in the Indictment, and not because of mistake or accident or other innocent reason.

The reason why the law treats such "other acts" evidence, as it is called, in the way I have described is because the law recognizes that it would not be fair to put the defendant on trial for charges not contained in the Indictment or call on a jury to speculate on the defendant's innocence or guilt of the charges in the Indictment on the basis the defendant may have been guilty of other acts.

* * * *

UNITED STATES DISTRICT COURT

Eastern District of Michigan

In the Matter of the Seizure of (Address or brief description of property or premises to be seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

> SEIZURE WARRANT CASE NUMBER 92X75843

TO: Agents of the Drug Enforcement Administration and any Authorized Officer of the United States: Affidavit(s) having been made before me by Christopher J. Hackbarth who has reason to believe that in the Eastern District of Michigan there is now certain property which is subject to forfeiture to the United States, namely (describe the property to be seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TO-GETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant.

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, serving this warrant and

making the seizure (in the daytime—6:00 a.m. to 10:00 p.m.)
(at any time in the day or night as I find reasonable cause has been established), leaving a copy of this warrant and receipt for the property seized, and prepare a written inventory of the property seized, and promptly return this warrant to

U.S. Judge or Magistrate
as required by law.

[SEP 30 1992] at Detroit, Michigan

Date and Time Issued City and State

MAGISTRATE JUDGE VIRGINIA A. MORGAN

Name and Title of Judicial Officer

Signature of Judicial Officer

Appendix A

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

VS.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

Defendant.

Misc. No. 92X75843

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANT

State of Michigan)
) 88
County of Shiawassee)

- I, Christopher J. Hackbarth, being duly sworn state:
- 1. I am a duly appointed Special Agent of the U.S. Drug Enforcement Administration (DEA), having been employed as such since 1991.
- 2. By virtue of my employment with DEA, I perform various tasks which include:
 - A. Functioning as a surveillance agent observing and recording movements of persons suspected of trafficking in drugs.

Appendix B

- B. Interviewing witnesses and informants relative to the illegal trafficking of drugs and the distribution of monetary assets derived from the illegal trafficking of drugs.
- C. Investigating asset forfeiture relative to the persons property that was used or intended to be used to facilitate a drug violation.
- I have participated in numerous domestic marijuana investigations from which I have learned:
 - A. That marijuana growers use specialized lighting systems to imitate sunlight. These lighting systems, in combination with electrical pumps, special exhaust vents to reduce heat and/or odor, and fans used to circulate carbon dioxide and oxygen substantially increase an indoor marijuana grower's electric cost.
 - B. That marijuana growers attempt to conceal the rooms or buildings used for growing. This frequently takes the form of blacking out all windows and/or sources of outside light.
 - C. That marijuana growers use chemicals to enhance growth, promote blooming and budding, and to regulate the acidity of the water for optimum growing conditions.
 - D. That marijuana growers may keep guns at the locations when they cultivate their marijuana to protect their operations.
 - E. That marijuana growers often start marijuana plants from seeds or seedlings

- indoors and transplant them outside as the spring growing season arrives.
- F. That marijuana growers often plant the marijuana plants outdoors in areas away from their residence, and in a number of small plots so as not to bring suspicion upon the growers.
- 4. As part of my responsibilities, I was specifically assigned to aid in the investigation of Guy URSERY in the seizure regarding their use of real property located at 1700 Braden Road, Perry, Michigan, with reference to the manufacture and/or housing or facilitating of drug trafficking. This location is more particularly described as:

Part of the West 1/2 of the Northeast 1/4 of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North 1/4 corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, socalled.

(Commonly know as 1700 Braden Road, Perry, Michigan)

5. As a result of reports made available to me from State law enforcement officers of the Michigan State Police and the Morrice, Michigan Police Department, I have learned the following:

6. Officer Chester Farrier of the Morrice, Michigan, Police Department has a reliable confidential informant, hereafter referred to as STATE-1. STATE-1 advised Officer Farrier that he/she is aware of a subject named Guy URSERY, whom STATE-1 has known for several years. STATE-1 told Officer Farrier that URSERY grows marijuana on his property every year by first starting seedlings indoors, and then transplanting them outside to let the plants grow to maturity.

7. The informant further advised Officer Farrier that some of the marijuana is dried by URSERY on a woodpile in URSERY's backyard and the marijuana is stored in a crawl space of the residence.

The informant further said that he/she could draw a map of the exact location of the growing marijuana.

 Officer Farrier then brought this information to the attention of D/Lt. Mike Pifer, and D/Trpr. Tom Feahr of the Michigan State Police-East Lansing Criminal Investigations Team.

10. Trpr. Feahr personally verified through Michigan Secretary of State driver and vehicle records, that a Guy URSERY showed to reside 1700 Braden Road, Perry, Michigan.

11. Trpr. Feahr and Officer Farrier then, using a map drawn by STATE-1, drove by URSERY's residence and saw that the map closely resembled the residence and the surrounding area. They then used the map to locate three outdoor marijuana growing plots on URSERY's property. Two of the plots contained at least nine growing marijuana plants each, while the third contained at least twenty-five

plants. Trpr. Feahr seized one growing marijuana plant from one of the plots and both officers left.

12. Trpr. Feahr then had a laboratory exam performed on the marijuana plant, and it was found to be marijuana.

13. Based on the above information, Trpr. Feahr obtained a search warrant from the Shiawassee County Prosecutor's Office on July 29, 1992. The warrant was signed by Magistrate Barnes.

14. On July 30, 1992, members of the Michigan State Police executed the search warrant at 1700 Braden Road, Perry, Michigan. The three outdoor grow plots which had been found by Trpr. Feahr earlier were located, as well as three additional outdoor grow plots. Numeric seeds, stems and other marijuana plant material was also found inside the residence, as documented below:

- A. two (2) brown paper sacks, containing 34 clear plastic baggies, each baggie containing a quantity of green plant stems and seeds, later found to be marijuana, retrieved from the right side, middle drawer of the desk in bedroom No.1
- B. one (1) brown pill bottle in the name of Sandra Cain containing suspected marijuana seeds, retrieved from the right side, middle drawer of the desk in bedroom No. 1.
- C. one (1) Reebok shoe box with ten (10) clear plastic baggies, each containing suspected marijuana seeds. Item was retrieved from shelf of closet in bedroom No. 1.

- D. a quantity of marijuana plant stalks and stems, found in the crawl space of the residence.
- E. two (2) clear plastic baggies with suspected marijuana seeds inside, retrieved from the closet of the radio room.
- F. a one (1) pound box of Ortho general purpose plant food found on a workbench in the garage.
- G. one (1) Mossberg 12 gauge shotgun, model 600AB, serial #C80054, found loaded in bedroom No. 1.
- H. twenty-four (24) marijuana plants from grow plot #1,
- thirty-three (33) marijuana plants from grow plot #2.
- J. fourteen (14) marijuana plants from grow plot #3.
- K. ten (10) marijuana plants from grow plot #4.
- forty-nine (49) marijuana plants from grow plot #5.
- M. twelve (12) marijuana plants from grow plot #6.
- N. one (1) Sylvania grow light, a "Gro-Lux" catalog, #GL-1302, two foot fixture and bulb, and two aluminum support brackets, all found in a box.

O. three (3) clear plastic baggies containing green plant stems and seeds, and a pill bottle in the name of Guy URSERY with a partially burnt hand rolled cigarette inside, found in the upper left desk drawer in bedroom No. 1.

The above drug exhibits were sent to the Michigan State Police Crime Lab for analysis. This analysis indicated the above substances were in fact marijuana.

15. A real property title ownership and encumbrance search for the real property located at 1700 Braden Road, Perry, Michigan revealed a Warranty Deed, dated July 15, 1988 between Rosalio De La Garza and Linda Marie De La Garza, his wife (as sellers) and Guy URSERY and Cynthia K. URSERY, his wife (as buyers) for said property, reflecting the consideration of \$19,900.00. The title search further revealed a Mortgage, dated May 2, 1989 between Guy J. URSERY and Cynthia K. URSERY and NBD Mortgage Company for 1700 Braden Road, reflecting the principal sum of \$41,000.00. The State Equalized Value (SEV) for the above property is \$32,550.00.

Wherefore, based on the above presented facts, the affiant asserts that there is probable cause to believe that the above described parcel of real property is subject to seizure and forfeitable as set forth in Title 21 U.S.C. 881(a)(7).

Special Agent Christopher Hackbarth
Drug Enforcement Administration

Subscribed and sworn
to before me this VIRGINIA M. MORGAN

__day of 1992 United States Magistrate Judge

[SEP 30 1992]

SUPREME COURT OF THE UNITED STATES

No. 95-345

UNITED STATES, PETITIONER

v.

GUY JEROME URSERY

[Filed Jan. 12, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. This case is consolidated with No. 95-346 - United States v. \$405,089.23 in U.S. Currency, et al. and a total of one hour is allotted for oral argument. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday February 23, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

SUPREME COURT OF THE UNITED STATES

No. 95-346

UNITED STATES, PETITIONER

v.

\$405,089.23 IN UNITED STATES CURRENCY, ET AL.

[Filed Jan. 12, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with No. 95-345 - United States v. Guy Jerome Ursery and a total of one hour is allotted for oral argument. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

5 FEB 23 1996 Nos. 95-345 and 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

21.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

- 1. In No. 95-345, the question presented is whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for manufacturing marijuana because the government obtained a consent judgment in a civil action that sought the forfeiture of respondent's property on the ground that it had been used to facilitate drug activities.
- 2. In No. 95-346, the question presented is whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities where the owners of the property were prosecuted for, and convicted of, narcotics and money laundering crimes.

PARTIES TO THE PROCEEDINGS

The petitioner in both cases is the United States of America. The respondent in No. 95-345 is Guy Jerome Ursery. The respondents in No. 95-346 are Charles Wesley Arlt, James Wren, Payback Mines, and the property listed in the caption to the final judgment of forfeiture, 95-346 Pet. App. 75a-77a.

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In the Supreme Court of the Anited States

OCTOBER TERM, 1995

No. 95-345

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

No. 95-346

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 95-345 (95-345 Pet. App. 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (95-345 Pet. App. 38a-41a) is not reported. The opinion of the court of ap-

peals in No. 95-346 (95-346 Pet. App. 1a-23a) is reported at 33 F.3d 1210. An order amending that opinion (95-346 Pet. App. 24a-25a) is reported at 56 F.3d 41.

JURISDICTION

The judgment of the court of appeals in No. 95-345 was entered on July 13, 1995. The judgment of the court of appeals in No. 95-346 was entered on September 6, 1994. A petition for rehearing was denied in No. 95-346, and the opinion was amended, on May 30, 1995. 95-346 Pet. App. 24a-29a. Petitions for writs of certiorari were filed in both cases on August 28, 1995, and were granted by the Court on January 12, 1996 (J.A. 81a-82a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 18 U.S.C. 371, 981, and 1956 and 21 U.S.C. 841, 846, and 881 are reproduced in the appendices to the petitions for certiorari.

STATEMENT

1. No. 95-345. After a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 63 months' imprisonment, to be followed by four years' supervised release. The court of appeals reversed his conviction. Pet. App. 1a-27a.

- a. On July 30, 1992, Michigan State Police executed a search warrant and found 142 marijuana plants growing on land just outside the boundaries of respondent's property in Perry, Michigan. Pet. App. 2a. Inside respondent's house, the officers found marijuana seeds, stems, and stalks, two loaded firearms, and a growlight. *Ibid*. While investigating that crime, law enforcement officers learned that respondent had been growing marijuana on his property and the land adjoining it for at least three years. During that period, respondent, his wife, and his son would harvest the marijuana, bring it back to respondent's house, and hang it in a crawlspace to dry. J.A. 44-56, 65-66.
- b. On September 30, 1992, the government filed an in rem complaint seeking forfeiture of respondent's property under 21 U.S.C. 881(a)(7). Pet. App. 28a-31a. The complaint alleged that, "[f]or several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance." Id. at 29a. Respondent and his wife filed a claim to the property and an answer to the forfeiture complaint. Subsequently, on May 24, 1993, respondent and his wife settled the forfeiture action by agreeing to pay \$13,250 in lieu of the forfeiture of the property. Id. at 32a-37a.
- c. In the meantime, on February 5, 1993, a grand jury returned an indictment charging respondent with a single count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a. The indictment charged that the manufacturing offense occurred on July 30, 1992, the date on which Michigan State Police searched respondent's property. Respondent was not indicted for narcotics possession

or distribution offenses, nor was he charged with any other criminal offense on the basis of his unlawful activities in the years leading up to the search. After his conviction on the manufacturing charge, respondent moved to dismiss the indictment on the ground that the Double Jeopardy Clause barred his criminal conviction following the civil forfeiture of his property. The district court denied the motion, finding that the forfeiture proceeding was not an "adjudication" because it was settled by a consent judgment and that "the forfeiture proceeding and criminal conviction were 'part of a single, coordinated prosecution of [a] person involved in alleged criminal activity." Id. at 39a (quoting United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994)).

d. A divided panel of the Sixth Circuit reversed. Pet. App. 1a-27a. The majority first found that "jeopardy" had attached in the civil forfeiture proceeding because the "consent judgment in [the] civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case." Id. at 6a. The court concluded that, because jeopardy attaches in a criminal case when the trial court accepts the defendant's plea, "[j]eopardy attached in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture." Id. at 7a.

Relying on United States v. Halper, 490 U.S. 435 (1989), and Austin v. United States, 113 S. Ct. 2801 (1993), the court next concluded that "any civil forfeiture under 21 U.S.C. § 881(a) (7) constitutes punishment for double jeopardy purposes." Pet. App. 11a. The court then rejected the government's argument that respondent's criminal conviction and the civil forfeiture of his property did not constitute pun-

ishment for the "same offence" within the meaning of the Double Jeopardy Clause. The court explained that "the forfeiture necessarily requires proof of the criminal offense. * * * The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." Id. at 12a. Finally, the court acknowledged that the government may impose multiple punishments for the same offense in a single proceeding, but it declined to find that the parallel civil forfeiture and criminal actions constituted a "single, coordinated proceeding" for double jeopardy purposes, because the actions proceeded before different judges and because there was no communication between the government lawyers assigned to the civil and criminal efforts. Id. at 13a-17a.

Judge Milburn dissented. Pet. App. 19a-27a. In his view, the question whether parallel criminal and civil actions are a "single proceeding" for double jeopardy purposes should turn on "the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings." Id. at 22a. That approach, he argued, "avoids the inevitable difficulty of a case-by-case comparison of the level of coordination" between the civil and criminal actions. Ibid. Because the "government was not acting to pursue a second punishment out of dissatisfaction with the first outcome" and the civil and criminal actions were active during the same time frame, he concluded that those actions were a single double jeopardy proceeding. Id. at 22a, 25a.

Judge Milburn also rejected the majority's conclusion that the civil and criminal actions imposed punishment for the "same offence." He noted that the civil forfeiture complaint

2. No. 95-346. In this civil forfeiture action, the district court granted summary judgment to the United States and ordered the forfeiture of United States currency, a helicopter, a boat, an airplane, 138 silver bars, and 11 automobiles. The court of

appeals reversed. Pet. App. 1a-23a.

a. Respondents Wren and Arlt participated in a massive conspiracy to manufacture methamphetamine. Respondents and others purchased large quantities of precursor chemicals and delivered them to methamphetamine manufacturers. Respondent Wren not only ordered large quantities of the chemicals, but, with another conspirator, also "transported hundreds of thousands of dollars in cash to pay for" them. Respondent Arlt aided and abetted the manufacture of methamphetamine, and hired others to transport the drugs and to act as intermediaries with Mexican traffickers. See United States v. Arlt, No. 92-50467. 1994 WL 678535 (9th Cir. Dec. 1, 1994).

On June 12, 1991, a grand jury returned a superseding indictment charging Arlt, Wren, and five others with conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. 846. The indictment also charged Arlt and Wren with conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371, and Arlt was charged with 17 counts, and Wren with 13 counts, of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 79a-105a. On March 27, 1992, after a jury trial, Arlt and Wren were convicted on all counts. The district court sentenced Arlt to life imprison-

ment and a ten-year term of supervised release, and imposed a fine of \$250,000. Id. at 106a-108a. Wren was sentenced to life imprisonment and a five-year term of supervised release. Id. at 109a-111a.2

b. On June 17, 1991, five days after the return of the superseding indictment, the government filed an in rem complaint seeking forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981(a)(1)(A) of currency, cars, vessels, silver bars, and aircraft seized from or titled to Arlt, Wren, or Payback Mines, a corporation controlled by Arlt. Pet. App. 30a-49a. Wren, Arlt, and Payback Mines filed claims to the defendant properties. By agreement of the parties, litigation of the forfeiture action was deferred during the pendency of the criminal prosecution. Id. at 50a-52a.

After respondents' criminal convictions, the government sought summary judgment in the forfeiture case, contending that the defendant assets were the proceeds of illegal narcotics trafficking and, alternatively, were "involved in," or "traceable to" properties involved in, money laundering. The district court granted the government's motion. The court found that all of the assets were subject to forfeiture as proceeds of illegal narcotics activity. In

charged that the defendant property had been used to grow marijuana "for several years," but that the indictment charged an offense occurring on a single day. Pet. App. 26a-27a.

² On December 1, 1994, the Ninth Circuit reversed Arlt's conviction on the ground that he was improperly denied his right to self-representation, and remanded for a new trial. See United States v. Arlt, 41 F.3d 516. That decision did not affect Wren's conviction, the only other claimant who was criminally prosecuted. Wren's conviction was affirmed by the same panel in an unpublished order, but (on the government's cross-appeal) the panel vacated his sentence and remanded for resentencing. See United States v. Wren, No. 92-50467, 1994 WL 678535 (Dec. 1, 1994).

the alternative, the court held that, except for the silver bars, the defendant property was subject to forfeiture under the money laundering theory. Pet. App. 53a-74a.

c. The Ninth Circuit reversed the forfeiture judgment. Pet. App. 1a-23a. The court held that the forfeiture of Wren's and Arlt's property constituted punishment for the same offenses that had formed the basis for their criminal convictions and thus that the forfeiture judgment imposed an impermissible second punishment, in violation of the Double Jeopardy Clause. First, the court held that the civil forfeiture and criminal prosecutions constituted "separate proceedings" for double jeopardy purposes. Id. at 7a. Although the court acknowledged that two other circuits had come to the opposite conclusion, id. at 8a (citing United States v. Millan, 2 F.3d at 20; United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994)), it found that "[a] forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time." Pet. App. 8a.

The court further found that civil forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981 invariably constitutes punishment. The court recognized that, under United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), it was "clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes." Pet. App. 13a. The panel concluded, however, that this Court "changed its collective mind" (ibid.) in United States v. Halper, 490 U.S. 435 (1989), by holding that certain civil proceedings can result in punishment for purposes of

the Double Jeopardy Clause's prohibition on multiple punishments. The panel found confirmation for that conclusion in Austin v. United States, 113 S. Ct. 2801 (1993), which held that civil forfeitures of property used to facilitate a drug crime should be considered "punishment" for purposes of determining the threshold applicability of the Excessive Fines Clause of the Eighth Amendment. The panel found that "the only fair reading" of Austin is that all civil forfeitures must be deemed "punishment" not only under the Eighth Amendment, but also under the Double Jeopardy Clause. Pet. App. 15a.

d. The government sought rehearing and suggested rehearing en banc, which the court of appeals denied. In denying rehearing, the panel amended its opinion to note (Pet. App. 25a) that its categorical approach was also "compelled" by Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994), a case decided before the panel's decision, but not cited in its original opinion. The panel explained that Kurth Ranch "applied Austin's categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a statute that taxed drug monies." Pet. App. 25a.

Seven judges dissented from the denial of rehearing en banc. Pet. App. 25a-29a. Writing for the dissenters, Judge Rymer disputed the panel's conclusion that forfeiting the proceeds of unlawful activity is "punishment." Id. at 27a. She also noted that the panel's categorical approach to punishment questions "writes 89 Firearms off the books" by citing Halper and Austin "out of context and surmising that 'the Court changed its collective mind' * * * despite the fact that

the Court itself didn't say that it had." Ibid. Judge Rymer also rejected the panel's view that Kurth Ranch should be read to support a "categorical" approach to the forfeiture of proceeds, noting that "Kurth Ranch was a double jeopardy case * * that was decided after Austin, yet mentioned Austin only in passing and then only as holding that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines." Id. at 29a n.3 (citing Kurth Ranch, 114 S. Ct. at 1945).

SUMMARY OF ARGUMENT

The courts below concluded that under United States v. Halper, 490 U.S. 435 (1989), and this Court's decisions since Halper, each respondent was twice punished, in violation of the Double Jeopardy Clause of the Fifth Amendment. Each court, viewing the second "punishment" as having resulted from an impermissible second "proceeding" against respondents, ordered the second "proceeding" (the forfeiture in \$405,089.23 and the criminal conviction in Ursery) dismissed in its entirety. That analysis is erroneous for several independent reasons.

A. The core protection of the Double Jeopardy Clause is the prohibition against prosecuting a defendant more than once for the same offense. That protection is triggered only when a defendant is placed "in jeopardy." This Court's cases have defined that phrase to denote the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. That understanding of "jeopardy" flows from the unique role and consequences of criminal sanctions in our society.

It also accords with the Clause's historical origins in common-law pleas peculiar to the criminal process.

In rare cases, that core protection against successive prosecutions may be relevant when the government invokes a purportedly civil statute that is so pervasively punitive that due process requires that its sanctions be enforced only after a criminal trial. E.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In such a rare case, the application of the purportedly civil sanction could be said to place the defendant "in jeopardy." But that limited principle does not help respondents in these cases, because this Court has long held that in rem forfeitures pursuant to civil statutes are not so punitive that they may be enforced only with the safeguards of a criminal trial. The Court most recently reaffirmed that view in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), in which it unanimously rejected the double jeopardy claim of a property owner who had been tried for and acquitted of the criminal offenses underlying the forfeiture. In light of 89 Firearms, respondents have no double jeopardy claim that they have been subjected to multiple prosecutions.

B. The courts below relied principally on the multiple punishments strand of double jeopardy law, which they believed was effectively revolutionized by this Court's decision in Halper. That conclusion reflects a grave misunderstanding of the scope of the prohibition of multiple punishments as applied in Halper. That doctrine, which originated with Exparte Lange, 85 U.S. (18 Wall.) 163 (1873), protects two distinct interests of a criminal defendant. The first is that a court may not impose a greater sentence than the legislature authorized. The second is that a court may not increase a defendant's sen-

tence if to do so would disturb his legitimate expectation of finality in a criminal judgment. In either event, the protection against multiple punishments is a consequence of the defendant's having been placed "in jeopardy," and then convicted of a crime.

Halper involved the second aspect of the "multiple punishments" doctrine-the protection of a defendant's legitimate expectation of finality in a criminal judgment. In that case, the government sought what the Court viewed as a punitive civil fine after the defendant's criminal sentence had become final. In rejecting that attempt, the Court did not rely on any view that the civil action was an impermissible second prosecution for the offense. Nor did it reject its precedents dealing with whether a nominally "civil" remedy in fact constituted a "criminal" sanction. The Court concluded only that a defendant's legitimate expectation of finality in his sentence, can, in a "rare case," be upset when the government seeks to inflict additional punishment in a civil proceeding. In such a case, the "multiple punishments" doctrine does not bar the second (civil) proceeding, but only so much of the penalty sought as would constitute an additional sentence.

Halper and the "multiple punishments" doctrine it invoked therefore are relevant only when the government can fairly be said to be seeking, in a proceeding commenced after a criminal judgment has become final and unappealable, to increase the sentence reflected in that judgment. Because respondent Ursery entered into a consent judgment of civil forfeiture before he was placed "in jeopardy," that doctrine cannot help him.

C. The respondents in \$405,089.23 were placed "in jeopardy," and convicted in a criminal case, be-

fore entry of the civil judgment forfeiting the proceeds of their crimes. They cannot demonstrate, however, that the civil judgment forfeiting the proceeds of their narcotics trafficking should be viewed as a "punishment" under this Court's double jeopardy cases. Nor would respondent Ursery be able to demonstrate that the forfeiture of his property used to facilitate drug offenses constitutes "punishment."

In concluding that civil forfeitures always impose "punishment," both courts below relied principally on Austin v. United States, 113 S. Ct. 2801 (1993). Austin, however, held only that the forfeiture of property used to facilitate drug offenses is sufficiently punitive to be subject to analysis under the Eighth Amendment's prohibition against excessive fines. Austin relied on language in Halper for a broad definition of "punishment"-a definition that could include any sanction that serves partly as a deterrent. Austin also relied on the Court's view that, as a historical matter, forfeiture of property used to commit crimes has always been considered punitive, at least "in part." Austin's analysis is inapplicable here. The civil in rem forfeiture of instrumentalities of crime has been a fixture of our law since the Nation's earliest years. Even if understood as partly punitive, those civil laws have never been thought so intrinsically punitive, as a categorical matter, as to trigger double jeopardy scrutiny. The holding of Halper requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection. A categorical application of that protection based on the potential that a forfeiture statute may produce a punitive judgment is inconsistent with Halper's holding.

Forfeitures of facilitating property should therefore be examined in accordance with the case-by-case approach adopted in *Halper*. Under that approach, a forfeiture of property that facilitated a drug offense should be found remedial if it can rationally be explained as serving the traditional remedial justifications for that in rem remedy: encouraging owners to take care in the use of their property; abating a nuisance; and providing recompense to the government for the law enforcement costs and social harms of drug trafficking. That is the case here with respect to respondent Ursery's property.

Even if the forfeiture of "facilitating" property were found generally to impose punishment for double jeopardy purposes, the forfeiture of "proceeds" of narcotics trafficking should not be found punitive. Statutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other in rem forfeitures, on which Austin relied, but were first adopted within the last 20 years to ensure that criminal activity is not profitable. Those statutes therefore simply prevent unjust enrichment, a plainly remedial, rather than punitive, goal.

D. Even if civil forfeiture amounts to an "offense" that triggers double jeopardy protections, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of those of which respondents were convicted. A straightforward application of the "statutory elements" test of Block-burger v. United States, 284 U.S. 299 (1932), compels that conclusion. Each of the forfeiture statutes requires proof of a fact that the criminal statutes do not require, to wit, that the defendant property played some role in the commission of a crime. Conversely, each of the criminal statutes requires proof of at

least one element not found in the forfeiture statutes, to wit, the property owner's knowing commission of a crime. Indeed, because the government may obtain forfeiture under 21 U.S.C. 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

E. Finally, even if the forfeitures in these cases constitute "punishment" for the offenses of which the claimants were convicted, the civil and criminal sanctions should be regarded as part of a single proceeding for purposes of the Double Jeopardy Clause. The issue whether a "proceeding" is impermissibly successive for constitutional purposes does not turn on formalities such as whether it bears a new docket number, is heard by a new judge, or is handled by a new government lawyer. Those factors are present in many government sentencing appeals; yet, they do not make the appeal a new "proceeding" at which punishment is improperly increased. Rather, because the "multiple punishments" doctrine protects a legitimate expectation of finality in a criminal sentence, a proceeding is impermissibly successive only when it is commenced after the defendant acquires a legitimate expectation that further punishment will not be imposed. It is then that Halper's underlying concern-to prevent the government from seeking a new punishment because it is dissatisfied with the defendant's sentence-comes into play. That concern is inapplicable in these cases, because the government's conduct reveals a design to seek the authorized civil and criminal sanctions in parallel and contemporaneous proceedings.

ARGUMENT

THE PARALLEL CRIMINAL CONVICTIONS AND CIVIL IN REM FORFEITURES IN THESE CASES DID NOT VIOLATE RESPONDENTS' RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

- A. In Rem Forfeiture Is A Civil, Remedial Sanction That Does Not Implicate The Double Jeopardy Clause's Prohibition Of Multiple Prosecutions
- 1. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." That Clause "had its origin in the three common-law pleas of autrefois acquit, autrefois convict, and pardon," which "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." United States v. Scott, 437 U.S. 82, 87 (1978); see also United States v. Wilson, 420 U.S. 332, 340-342 (1975); accord Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting), overruled by United States v. Dixon, 113 S. Ct. 2849 (1993); Green v. United States, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting). The "core * * * area protected" by the Clause (United States v. Scott, 437 U.S. at 96) accordingly has always been the defendant's right not to be tried for a criminal charge more than once. United States v. Wilson, 420 U.S. at 343; see Schiro v. Farley, 114 S. Ct. 783, 789 (1994) ("[O]ur cases establish that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle'") (internal brackets and citations omitted); see also Tibbs v. Florida, 457 U.S. 31, 41 (1982); United States v. Dixon, 113 S. Ct. at

2882 (Souter, J., concurring in the judgment in part and dissenting in part).

As the language of the Clause requires, its protection depends upon the defendant being placed "in jeopardy." See, e.g., Serfass v. United States, 420 U.S. 377, 388, 390-391 (1975). This Court has interpreted that requirement, in light of its history, as being met only by the dangers associated with the actual trial of a criminal case: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." Breed v. Jones, 421 U.S. 519, 528 (1975); see Serfass v. United States, 420 U.S. at 391 ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused'") (quoting Kepner v. United States, 195 U.S. 100, 133 (1904)); Crist v. Bretz, 437 U.S. 28, 34-36 (1978) ("jeopardy" concept protects accused from repeated attempts "to convict," safeguards his right to have his trial completed by a particular tribunal, and therefore has "roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice"): United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-549 (1943) ("'jeopardy' within the constitutional meaning" refers to the risks associated with "actions intended to authorize criminal punishment to vindicate public justice").

The reasons for that focus are rooted in the unique role and consequences of criminal sanctions in our society. A conviction represents the societal judgment that a person is a "criminal" and subjects that person to stigma that is unmatched by any other assertion of governmental power. See Breed v. Jones, 421 U.S. at 530; see also Price v. Georgia, 398 U.S. 323, 331 n.10 (1970). Each such judgment typically has long-lasting collateral consequences both in the jurisdiction in which the conviction is obtained and in others. See Benton v. Maryland, 395 U.S. 784, 790 (1969); Missouri v. Hunter, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting). Because a criminal prosecution "is an ordeal not to be viewed lightly," Price v. Georgia, 398 U.S. at 331, the fundamental notion of the Double Jeopardy Clause is that the government

should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187-188; Serfass v. United States, 420 U.S. at 388; see also Tibbs v. Florida, 457 U.S. at 41 ("Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance"). Thus, as a general matter, "[s]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in the enforcement of criminal laws." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.)); see Abney v. United States, 431 U.S. 651, 661 (1977).

2. Most cases arising under the "multiple prosecutions" doctrine do not require the characterization of the nature of the proceedings, because there is rarely any doubt that the government seeks a second criminal trial. Instead, those cases primarily involve the question whether the second trial falls within an exception to the multiple prosecutions prohibition. See. e.g., Richardson v. United States, 468 U.S. 317, 323-326 (1984) (permissible to retry defendant when first trial ends with a hung jury); United States v. Scott, 437 U.S. at 98-101 (permissible to retry defendant when first trial was erroneously terminated at his behest on grounds unrelated to factual guilt): United States v. Ball, 163 U.S. 662, 671-672 (1896) (retrial permitted after conviction is reversed on

appeal).

Nonetheless, the Court has recognized that a civil statute may be so stigmatizing and punitive in all of its applications that it effectively operates as a criminal sanction. In that setting, the nominally civil sanction is properly characterized as criminal in effect, and such a statute cannot be invoked at all without complying with the safeguards that the Constitution requires for criminal trials. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184-186 (1963) (invalidating a statute that prescribed, without a criminal trial, loss of citizenship for any person who, to evade military service, remained outside the United States in time of war); Wong Wing v. United States. 163 U.S. 228, 235-238 (1896) (invalidating a statute that provided, without a criminal trial, for aliens to be confined at hard labor for one year before being deported); compare Allen v. Illinois, 478 U.S. 364, 368-369 (1986) (upholding statute that provided for involuntary civil commitment of "sexually dangerous

persons"); United States v. Ward, 448 U.S. 242, 248-251 (1980) (upholding statute that imposed civil penalties on parties responsible for the discharge of hazardous substances).³

If the government were to invoke such a pervasively penal civil statute against a person who already has been criminally tried for the same offense, it would effectively place him "twice in jeopardy," in violation of the Fifth Amendment. Civil forfeiture statutes, however, have never been viewed as having that effect. This Court has often rejected the claim that statutes providing for the *in rem* civil forfeiture of property are so punitive that they may only be enforced after a criminal trial, or that they place a property owner "in jeopardy." Indeed, because laws authorizing the *in rem* civil forfeiture of property involved in criminal activity—from violations of customs and imposts laws to piracy—were among the earliest statutes enacted by Congress, see *United*

States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1131-1132 (1993) (plurality opinion of Stevens, J.); see also C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974), they repeatedly "have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." Helvering v. Mitchell, 303 U.S. 391, 400 (1938).

Thus, in Various Items of Personal Property v. United States, 282 U.S. 577 (1931), the Court unanimously rejected the contention that the prior conviction of property owners for defrauding the government of liquor taxes barred the forfeiture of property-a distillery, a warehouse, and a denaturing plant-used in the commission of the fraud. Id. at 580. The Court reasoned that the forfeiture was an in rem civil proceeding against the property, rather than "a criminal prosecution [in which] it is the wrongdoer in person who is proceeded against, convicted and punished." Id. at 581. The Court accordingly concluded that "[t]he forfeiture is no part of the punishment for the criminal offense," and that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply." Ibid.; see also Dobbins's Distillery v. United States, 96 U.S. 395, 403-404 (1878). Seven years

⁸ In Kennedy v. Mendoza-Martinez, the Court identified several factors that, though "neither exhaustive nor dispositive" (United States v. Ward, 448 U.S. at 249), provide useful guideposts in determining whether particular statutory sanctions are so punitive that they may be imposed only after a criminal prosecution (372 U.S. at 168-169) (footnotes omitted):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

⁴ Various Items was decided on the same day as United States v. La Franca, 282 U.S. 568 (1931). In that case, the Court, to avoid a constitutional issue, unanimously construed a statute that authorized a civil action to recover certain taxes, which the Court viewed as penalties, as not permitting such recovery after conviction of the defendant for a criminal offense arising from the same transactions. Justice Sutherland, who wrote for the Court in both cases, after adverting

later, the Court decided Helvering v. Mitchell, supra, which presented the question whether a proceeding to collect an income tax deficiency and a 50% penalty for fraud was "essentially criminal." 303 U.S. at 400. In rejecting that claim, the Court explained that, "[i]n spite of their comparative severity," customs forfeitures had been held "enforcible by civil proceedings," ibid., and that tax penalties are likewise "remedial" sanctions because "[t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud," id. at 401.

More recently, in One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam), the Court rejected the notion that the Double Jeopardy Clause barred a forfeiture of property smuggled into the United States after the acquittal of the person charged with illegally importing the property. Relying on Helvering v. Mitchell, supra, the Court held that "the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." 409 U.S. at 235. The Court found that the forfeiture, "a civil sanction," was properly characterized as remedial because "[i]t prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." Id. at 236-237; see also Calero-Toledo, 416 U.S. at 687 n.26 ("forfeiture statutes also help compensate the Government for its enforcement efforts"); Van Oster v. Kansas, 272 U.S. 465, 466 (1926) (property used to violate the law may be regarded as a "common nuisance").

The Court unanimously reaffirmed its longstanding view of in rem forfeitures in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). After examining the factors outlined in Mendoza-Martinez, supra, and Ward, supra, the Court held that the Double Jeopardy Clause did not bar a civil in rem action to forfeit firearms "involved in or used or intended to be used in" violations of the Gun Control Act of 1968 following the owner's acquittal of related violations of that Act. 465 U.S. at 362-366. The 89 Firearms Court explained that, "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." Id. at 362. In concluding that the in rem proceeding could not fairly be viewed as a second criminal prosecution, the Court noted that Congress intended the forfeiture to be a civil remedy, id. at 363, that the forfeiture provisions "were meant to be broader in scope than the criminal sanctions," id. at 364, since they provided for forfeiture of property "involved in or used or intended to be used in" violations of law, id. at 363, and that the statute furthered the "broad remedial aims" of "discouraging unregulated commerce in firearms and * * * removing from circulation firearms that have been used or intended for use outside regulated channels of commerce," id. at 364. Because the forfeiture served goals "plainly more remedial than punitive," ibid., and the claimant "failed to establish by the 'clearest proof'" (id.

to La Franca in Various Items, noted that such considerations did not apply to "a proceeding in rem to forfeit property used in committing an offense." Various Items, 282 U.S. at 580.

at 366) that the statute was "so punitive either in purpose or effect" as to negate Congress's intent "to establish a civil remedial mechanism," id. at 365, the Court concluded that the forfeiture was "not an additional penalty for the commission of a criminal act, but rather [was] a separate civil sanction, remedial in nature[,] * * * [that was] not barred by the Double Jeopardy Clause," id. at 366.

3. The foregoing cases establish that in rem civil forfeiture proceedings under the statutes at issue in these cases cannot be viewed as criminal prosecutions barred by the "multiple prosecutions" component of the Double Jeopardy Clause. Indeed, the Ninth Circuit conceded that under 89 Firearms "the law was clear" (95-346 Pet. App. 13a) that respondents Arlt and Wren could not secure dismissal of the forfeiture action on double jeopardy grounds. The Ninth Circuit believed (and the Sixth Circuit, in adopting the Ninth Circuit's analysis, presumably agreed, see 95-345 Pet. App. 9a-11a), however, that this Court "changed its collective mind" in three cases decided after 89 Firearms. See 95-346 Pet. App. 13a.

First, the Ninth Circuit believed that in United States v. Halper, 490 U.S. 435 (1989), this Court "abandoned the * * * approach" of Ward and Mendoza-Martinez, which focuses on whether an entire statute is so inherently punitive that its provisions could be enforced only in a criminal trial. In the Ninth Circuit's view, Halper adopted instead a new, more expansive definition of "punishment" to be applied on a case-by-case basis. 95-346 Pet. App. 13a-14a. Under that new definition, the court believed that a civil sanction that cannot be said to serve "solely" a remedial purpose, but which also acts as a

deterrent, is "punishment." Id. at 14a. Second, the Ninth Circuit concluded that in Austin v. United States, 113 S. Ct. 2801 (1993), an Excessive Fines Clause case, this Court abandoned Halper's case-bycase approach and adopted a "categorical" analysis. That analysis retains the "new-found wisdom" of Halper's expansive definition of "punishment," 95-346 Pet. App. 14a, but applies it "to the entire scope of the statute which the government seeks to employ." id. at 16a. The third case, Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994). was read by the Ninth Circuit as "compell[ing]" its interpretation of Austin and Halper. See 95-346 Pet. App. 25a.

As we demonstrate next, that analysis of this Court's cases since 89 Firearms is unsound. It fails to recognize that Halper invoked an established doctrine of double jeopardy law—the prohibition of multiple punishments-that by then had developed subject to important limitations. In particular, that branch of double jeopardy law has never been a doctrine that speaks to punishment simpliciter, but rather one that comes into operation only when a criminal defendant has been placed "in jeopardy"i.e., at risk of conviction for a criminal offense. The protection against multiple punishments is a consequence of jeopardy, as this Court's cases have defined that term, not a substitute for it, as both courts below supposed. Nothing in Austin or Kurth Ranch changes that understanding.

- B. The Courts Below Misconstrued Halper, And This Court's Decisions Since Halper, By Failing To Recognize The Limits Of This Court's "Multiple Punishments" Cases
- 1. The doctrine that the Double Jeopardy Clause prohibits the imposition of "multiple punishments" originated in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). The defendant in that case had been convicted of a crime for which Congress had authorized a sentence of a \$200 fine or a one-year prison term, but not both. The trial court, however, mistakenly sentenced Lange both to the maximum fine and to a one-year prison term. After Lange had paid the fine, the money had passed into the Treasury, and Lange had served five days of the prison sentence, he sought a writ of habeas corpus from the trial court. Id. at 164, 175. The trial court attempted to vacate the earlier judgment of conviction and to enter a new sentence of one year's imprisonment from the date of the second judgment. Id. at 175. On the defendant's original application for habeas corpus, this Court ordered him released.

The Court noted that, if the second sentence were enforced, the prisoner would pay \$200, serve a year in jail, "and five days' imprisonment in addition." 85 U.S. (18 Wall.) at 175. That result was objectionable on two separate but related grounds. First, when the trial court originally imposed sentence, it had lacked the statutory authority to impose both a fine and imprisonment. Second, once the prisoner fully served either lawful half of the first-imposed sentence, "the power of the court to punish further was gone." Id. at 176; accord Bozza v. United States, 330 U.S. 160, 167 n.2 (1947). The Court justified that conclusion

by invoking not only "the well-settled principles of the common law," 85 U.S. (18 Wall.) at 178; see also id. at 176, but also the Double Jeopardy Clause. As to the latter, the Court reasoned that the constitutional protection would be of little value "if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." Id. at 173; see also In re Bradley, 318 U.S. 50 (1943).

In light of Ex parte Lange's reasoning, this Court has interpreted the "multiple punishments" doctrine as reflecting two distinct principles of double jeopardy law. The first principle is that the Double Jeopardy Clause prohibits a court, when it sentences a defendant in a criminal case, from imposing "greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. at 366; see also North Carolina v. Pearce, 395 U.S. 711, 717-718 (1969). The second principle is that the Clause protects "also against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality." Jones v. Thomas, 491 U.S. 376, 385 (1989). An improper increase to a sentence would occur, for example, "where a judge imposes only a 15-year sentence under a statute that permitted 15 years to life. has second thoughts after the defendant serves the sentence, and calls him back to impose another 10 years." Ibid.; see id. at 392-394 (Scalia, J., dissenting); cf. United States v. DiFrancesco, 449 U.S. 117, 139 (1980) (government may, notwithstanding Ex parte Lange, appeal a criminal sentence where such action is authorized by statute, since such statute gives notice that district court's sentence is not final); Pennsylvania v. Goldhammer, 474 U.S. 28, 30-31 (1985) (per curiam) (same; remanding for inquiry into whether State law authorized prosecution's appeal); United States v. Martin Linen Supply Co., 430 U.S. at 569 n.6 (noting that, as interpreted in Ex parte Lange, "[t]he Double Jeopardy Clause * * * accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense").

2. United States v. Halper, supra, was an extension of the second principle of Ex parte Lange—i.e., the rule that a judgment of conviction in a criminal case, once it has become final and unappealable, may not be modified so as to increase the sentence already imposed. Halper was criminally prosecuted and convicted in 1985 of violating the false-claims statute, 18 U.S.C. 287 (1982), by submitting 65 inflated Medicare claims that each charged \$12 for what was really a \$3 procedure. He was sentenced to two years' imprisonment and fined \$5,000. 490 U.S. at 437 & n.2.

The government later sought civil sanctions based on the same inflated claims under 31 U.S.C. 3729-3731 (1982), a "fixed-penalty-plus-double-damages provision[]" of the type that "in the ordinary case * * * can be said to do no more than make the Government whole." 490 U.S. at 438, 449. That statute required for each violation a penalty of \$2,000, an additional amount equal to two times the government's damages, and the costs of the civil action. Id. at 438. Because of his numerous violations, however, "Halper * * * appeared to be subject to a statutory penalty of more than \$130,000." Ibid. The district court refused to enter judgment in that amount, reasoning that a penalty "more than 220 times greater than the Government's measurable loss qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." Id. at 439-440. On the government's direct appeal, this Court agreed with that conclusion.

The Court framed the issue as whether "in a particular case a civil penalty * * * may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U.S. at 442. In answering that question, the Court carefully distinguished the approach it had taken in Ward and similar cases, which, the Court explained, "is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter." Id. at 447. By contrast, the Court noted, "the Double Jeopardy Clause's proscription of multiple punishments * * is intrinsically personal," ibid., and "requires a particularized assessment of the penalty imposed and the purposes that the penalty

requiring "nonappealable" finality for the sentence reflected in a judgment of conviction, see also United States v. Benz, 282 U.S. 304, 307 (1931), this Court's later decision in DiFrancesco rejected that view. While an appellate increase in the sentence imposed by the trial court might be viewed as a second "punishment" in a subsequent "proceeding," the Court held that the defendant can have no legitimate expectation of finality when a statute authorizes the government's appeal, so that the hearing of the appeal amounts "at the most [to the second part of] a two-stage sentencing procedure." United States v. DiFrancesco, 449 U.S. at 140 n.16.

may fairly be said to serve," id. at 448. The Court concluded that "the labels 'criminal' and 'civil' are not of paramount importance" in that inquiry, since "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Id. at 447 & n.7. The Court accordingly

h[e]ld that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-449 (emphasis added). That holding, the Court emphasized, was "a rule for the rare case," in which a defendant is subjected to a sanction so "overwhelmingly disproportionate to the damages he has caused" that "it constitutes a second punishment." Id. at 449, 450.

The Court's holding demonstrates that, "[w]hatever else may be said about" Halper, "it d[id] not alter the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy." Serfass v. United States, 420 U.S. at 393. Halper did not hold that a "punishment" imposed in a civil proceeding is a "jeopardy" that triggers protection against a later criminal prosecution. Nor did Halper hold that whether a proceeding is properly characterized as criminal in nature is irrelevant to applicability of the Clause's protections. Instead, Halper held that, when the defendant has been criminally prosecuted and punished, the finality branch of the multiple punishments doctrine precludes an increase in the defendant's sentence even when, as a formal matter, the additional punishment would result from a civil statute that is nonpunitive in the great ma-

jority of its applications.

The multiple punishments principle that has developed from Ex parte Lange to Halper turns on the notion that criminal convictions and their resulting sentences, at some point, achieve a degree of finality that is worthy of societal protection. Those cases express the view that once the government has exacted a punishment through the criminal process and has obtained a final judgment, a defendant may not be called upon to bear a second punishment for the same offense, whether the punishment be explicitly criminal, as in Lange, or so punitive as to amount to the same result, as in Halper. While the use of the Double Jeopardy Clause to protect against multiple punishments has been questioned, see Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. at 1955-1959 (Scalia, J., dissenting), what has not been questioned is that the doctrine, as formulated, takes as its predicate an initial "jeopardy"—a risk of criminal conviction before a body competent to decide the question of guilt or innocence. In describing the consequences of a final criminal judgment, the doctrine thus belongs to the constitutional "common law" that pertains to the rights that follow from being placed in "jeopardy" in a criminal case. Compare Ashe v. Swenson, 397 U.S. 436 (1970) (Double Jeopardy Clause embodies "collateral estoppel" doctrine).

In keeping with that understanding, Halper repeatedly emphasized the fact of the earlier criminal prosecution, see 490 U.S. at 441, 448-449, 449, and

explained that, "when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding," id. at 451 n.10 (emphasis added). And the Court concluded by stating that "the only proscription established by [its] ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole."

Id. at 451 (emphasis added).

Nothing in Austin v. United States, supra, changes the conclusion that an initial "jeopardy"—i.e., a prior criminal prosecution—is a prerequisite to the invocation of the Double Jeopardy Clause. Austin did not involve the Double Jeopardy Clause at all. It held that the civil forfeiture provisions at issue in that case (21 U.S.C. 881(a)(4) and (7)) triggered the applicability of the Eighth Amendment's Excessive Fines Clause. The Court expressly distinguished two of its double jeopardy precedents concerning the forfeiture of contraband or goods involved in customs violations, after noting that the forfeitures in both of those cases were remedial. 113 S. Ct. at 2811-2812 (citing 89 Firearms, 465 U.S. at 364, and One Lot Emerald Cut Stones, 409 U.S. at 237). The Austin Court did rely on Halper in assessing whether in rem civil forfeitures could be viewed as a "punishment" that triggers the protections of the Eighth Amendment. 113 S. Ct. at 2805-2806, 2810 n.12, 2812. But Austin did not purport to alter Halper's double jeop-

ardy holding as a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a [civil] sanction overwhelmingly disproportionate to the damages he has caused," after having been criminally prosecuted and punished. 490 U.S. at 449.

Department of Revenue of Montana v. Kurth Ranch, supra, the third case on which the Ninth Circuit relied, does not support, much less "compel[]," 95-346 Pet. App. 25a, that court's interpretation of Halper and Austin. Kurth Ranch mentioned Austin only in passing to describe Austin's Eighth Amendment holding, 114 S. Ct. at 1945, and actually held that Halper did not furnish the proper framework for analyzing the issue before the Court, which was whether the Double Jeopardy Clause barred collection of Montana's tax on the possession of dangerous drugs after the "taxpayers" had been criminally prosecuted and punished. Id. at 1948. The Court struck down the tax based on several "unusual features" in the statute that authorized it, which "[t]aken as a whole" rendered the tax "a concoction of anomalies." Id. at 1947, 1948. Specifically, the Court found it significant that the statute conditioned liability on commission of a crime, that the tax was due and collectable "only after the taxpayer ha[d] been arrested for the precise conduct that gives rise to the tax obligation in the first place," that the tax was an in personam sanction that was exacted after the drugs had been confiscated and destroyed, and that the tax amounted to more than eight times the market value of the drugs. Id. at 1947. As the Court noted, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakably punitive character" especially when it is "imposed on criminals and no others." Id. at 1948.

Those "exceptional" (114 S. Ct. at 1948) features persuaded the Court that the proceeding to collect the tax "was the functional equivalent of a successive criminal prosecution that placed the [taxpayers] in jeopardy a second time 'for the same offence'" for which they had previously been criminally prosecuted. Ibid. That holding of Kurth Ranch, and the Court's conclusion that the Halper test was inapplicable, suggest that the Court viewed the proceeding to collect the tax as "essentially criminal," see Helvering v. Mitchell, 303 U.S. at 400, and thus that it violated the Double Jeopardy Clause's prohibition on successive criminal prosecutions. Kurth Ranch therefore may be best understood as falling into the long line of decisions, including Mitchell, Mendoza-Martinez, and Ward, that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied. It does not signal a departure from the case-by-case approach adopted in Halper in the multiple punishments context, which requires an assessment of the purposes served by a particular sanction as applied to the case at hand. Still less does Kurth Ranch dispense with a prior criminal "jeopardy" as a prerequisite for invoking multiple punishments analysis.

The Court's most recent double jeopardy decision, Witte v. United States, 115 S. Ct. 2199 (1995), also undermines the broad reading of Halper and Kurth Ranch adopted by the courts below, because it confirms that those cases do not change the long-standing rule that a person must first suffer the risk of conviction for a crime before he may claim any double jeopardy violation. Witte was first convicted of attempting to possess marijuana with intent to distribute it. His sentence for that offense was increased

on the basis of the trial judge's finding that he had also participated in cocaine importation offenses. When Witte was later separately indicted for those cocaine offenses, he sought dismissal of the charges on the ground that he had already been "punished" for them during the sentencing on the marijuana charge. Although Witte relied on Halper and Kurth Ranch, see Brief for Petitioner at 32-34, Witte v United States, No. 94-6187 (O.T. 1994), and a broad interpretation of those cases could have supported his claim, see Witte v United States, 115 S. Ct. at 2209-2210 (Scalia, J., concurring in the judgment); id. at 2212-2213 (Stevens, J., concurring in part and dissenting in part), this Court rejected it. The Court noted that Witte "clearly was neither prosecuted nor convicted of the cocaine offenses during the first criminal proceeding," id. at 2204, and concluded that he also was not "punished" for those offenses when his earlier sentence was increased, because "for double jeopardy purposes" he could be deemed to have suffered "'punishment' * * * only for the offense of which [he was] convicted," id. at 2205; see also id. at 2206. In other words, because Witte was not at risk of conviction for the cocaine offenses when he was sentenced on the marijuana charge, he had failed to meet the threshold predicate for either a multiple prosecutions or a Halper multiple punishments claim.

3. The foregoing analysis demonstrates that the Sixth Circuit fundamentally erred by concluding that "jeopardy attached" when respondent Ursery settled the civil forfeiture action, and that this "jeopardy" barred the later jury trial on the criminal charges against him. 95-345 Pet. App. 6a-9a. As we have explained, the concept of "jeopardy" requires a proceeding in which a defendant risks conviction for a

criminal offense, with all the unique consequences that attend that societal judgment. Only a defendant who has suffered that particular type of "intrinsically personal" (United States v. Halper, 490 U.S. at 447) risk may thereafter lay claim to the "constitutional policy of finality * * * in federal criminal proceedings" (United States v. Jorn, 400 U.S. at 479 (plurality opinion of Harlan, J.)) that the Double Jeopardy Clause represents. The consent judgment entered in the in rem action involving respondent Ursery's property did not subject him to that sort of risk of a criminal trial or punishment; it merely concluded a civil action involving his property.

The Sixth Circuit drew an analogy between that consent judgment and a guilty "plea entered pursuant to a plea agreement." 95-345 Pet. App. 7a. A plea of guilty to a criminal offense, however, "is itself a conviction. Like a verdict of a jury it is conclusive." Kercheval v. United States, 274 U.S. 220, 223 (1927); accord United States v. Broce, 488 U.S. 563, 570 (1989). Because Ursery was not placed "in jeopardy" by the judgment entered in the in rem civil forfeiture action, he did not meet the threshold requirement for the applicability of Halper's multiple punishments analysis or any other double jeopardy claim. The Sixth Circuit accordingly erred in ordering the dismissal of his later judgment of conviction on double jeopardy grounds.

C. The In Rem Civil Forfeitures In These Cases Did Not Impose "Punishment" For Purposes Of The Multiple **Punishments Inquiry**

The Sixth and Ninth Circuits concluded that the civil forfeiture statutes at issue here necessarily and categorically inflict "punishment" on property owners for purposes of the Double Jeopardy Clause. As we

have shown, under this Court's cases, a "multiple punishments" inquiry is relevant only when a defendant has been criminally prosecuted, convicted, and sentenced. Accordingly, the inquiry should not have been undertaken at all in Ursery. Even if such an inquiry were appropriate, however, neither the forfeiture of the property used to facilitate the narcotics crimes in Ursery nor the property forfeited as proceeds of narcotics-related crimes in \$405,089.23 should be characterized as "punishment" for purposes of the Double Jeopardy Clause.

1. The forfeiture of the facilitating property in Ursery is not punishment. Under United States v. Halper, the issue whether a particular civil sanction amounts to "punishment" within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purposes. 490 U.S. at 448. In our view, the proper inquiry in the multiple punishments context is whether, as applied in a particular case, the sanction is rationally related to legitimate remedial aims. In the case of the forfeiture of property that facilitates a crime, we believe that the sanction

should generally be regarded as remedial.

a. The "hold[ing]" of Halper is that a civil sanction is punitive if it "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-449 (emphasis added). Under the holding of Halper, a dominant remedial purpose renders a sanction nonpunitive for purposes of the Double Jeopardy Clause, even if the sanction could also be said, in some respects, to act as a deterrent. Thus, Halper adopted a "rational-relationship requirement," whereby a sanction is deemed punitive when it "is not rationally related to the [nonpunitive] goal" that it purports to serve. Id. at 451 & n.12; compare Bell v. Wolfish, 441 U.S. 520, 539 (1979) ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment"); United States v. Salerno, 481 U.S. 739, 746-747 (1987).

Some language in *Halper* may be read to suggest that a civil sanction with *any* deterrent purpose should be viewed as "punishment." 490 U.S. at 448. In our view, that formulation would sweep too broadly. Such a conception of punishment is not supported by the precedent on which *Halper* relied. And a "test"

[w]e have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." Bell v. Wolfish, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. at 448.

⁷ The authorities cited by *Halper* in the passage quoted at note 6, *supra*, do not require the conclusion that the presence of a deterrent component in a sanction having multiple purposes is "punishment." *Mendoza-Martinez* listed factors relevant to whether a statute is so penal that it must be viewed as imposing criminal punishment; one of those factors is whether the statute's operation promotes retribution and deterrence. *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the second case cited by *Halper*, used the *Mendoza-Martinez* factors as guideposts to determine whether particular practices of prison

that considers any deterrent purpose to qualify a civil sanction as punishment diverges from the carefully circumscribed approach taken in *Halper*. There are few, if any, civil sanctions that do not serve *in part* to deter, and many are deliberately employed in part for that purpose. The view that any deterrent element means punishment would be inconsistent with the *Halper* Court's own emphasis on the limited scope of its ruling. See *id*. at 449, 450; see also *Kurth Ranch*, 114 S. Ct. at 1946.

Austin, however, relied on the broader formulation in Halper in holding that the forfeiture of property used to facilitate narcotics offenses is sufficiently punitive to warrant application of the Eighth Amendment's prohibition of excessive fines. 113 S. Ct. at 2806, 2810 & n.12, 2812. After noting various historical and contemporary features of forfeiture statutes that it viewed as signaling a punitive purpose,

administrators were "punishment." While the Court in Bell v. Wolfish did state generally that retribution and deterrence are punitive purposes, its overall test for measuring the nature of a sanction did not require that any element of deterrence makes a sanction punitive. Rather, Bell v. Wolfish states: "[I]f a particular condition or restriction * * * is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" 441 U.S. at 539.

⁶ The Court stated:

^a Austin found that in rem forfeitures "historically have been understood, at least in part, as punishment," 113 S. Ct. at 2810, and that nothing in 21 U.S.C. 881(a) (4) and (7) affirmatively dispelled that understanding. On the contrary, the Court noted that those subsections contain innocent-owner defenses that "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment," that Congress "has chosen to tie forfeiture directly to the commission of drug offenses," and that the legislative

the Court stated that, even on the assumption that forfeiting the instrumentalities of crime serves "some remedial purpose," the Eighth Amendment would still apply to those forfeitures because the Court could not conclude that they "serve[] solely a remedial purpose." Id. at 2812 (emphasis added). The Court should not apply that test here.

The sole question in Austin was whether the Excessive Fines Clause of the Eighth Amendment applies to in rem forfeitures, and the Court could have answered that question without reference to Halper's language at all. The dictionary definition of a "fine" —a "payment to a sovereign as punishment for some offense," 113 S. Ct. at 2812-does not require that punishment be the sole reason for a particular levy. and the Court concluded that the Framers understood the words "fine" and "forfeiture" to be synonymous. Id. at 2808 & n.7. Moreover, Austin expressly recognized that it "ma[d]e little practical difference" in that case whether the Excessive Fines Clause were held to apply to all forfeitures under the statutes at issue in that case, "or only to those that cannot be characterized as purely remedial." Id. at 2812 n.14. The practical consequences of applying the Eighth Amendment occur only when a fine is excessive, and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." Ibid.

history of those provisions characterized them as a "powerful deterrent." 113 S. Ct. at 2810-2811. The Court was also unpersuaded that conveyances used to commit drug crimes can be compared to "contraband," the forfeiture of which is concededly remedial, or that the forfeiture of such property furnishes a reasonable form of liquidated damages, since its value may vary dramatically. *Id.* at 2811-2812.

The extension of Austin's reasoning, however, to the double jeopardy setting would have significant practical consequences. In that setting, a categorical conclusion that all civil forfeitures under the statute at issue constitute punishment would defeat the caseby-case approach adopted in Halper itself.9 It could also completely bar a later criminal prosecution of the property owner, even if the particular prior civil forfeiture were fairly characterized as substantively remedial. That result would greatly expand Halper's rule "for the rare case." 490 U.S. at 449. And if Austin's formulation were extended to other contexts. it could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper, see, e.g., State v. Hickam, 668 A.2d 1321 (Conn. 1995) (double jeopardy challenge to DWI prosecution that followed suspension of motorist's license), would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable. Cf. Sandin v. Conner, 115 S. Ct. 2293, 2300 & n.5 (1995).10

⁹ Under Halper's approach, only so much of a sanction as constitutes punishment would be barred by a criminal conviction for the same offense. 490 U.S. at 449-450, 452; cf. Morris V. Mathews, 475 U.S. 237, 244-247 (1986). Under the categorical approach, all of the sanction would presumably be barred.

¹⁰ That the analysis of whether punishment is imposed may differ in the excessive fines and double jeopardy contexts is consistent with this Court's general treatment of forfeiture issues. Indeed, if anything is clear from this Court's cases, it is that this Court's characterization of forfeiture as either punitive or remedial has depended upon the specific legal context in which that question arose. Thus, in *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), and *United States* v. *United*

The mainstream of this Court's cases supports Halper's actual holding that a sanction is punitive only if it cannot rationally be explained by reference to a nonpunitive interest. See, e.g., Bell v. Wolfish, 441 U.S. at 539. Just one Term after Austin, the majority in Kurth Ranch recognized that in the double jeopardy context even "an obvious deterrent purpose" does not necessarily mark government practices as "punishment." 114 S. Ct. at 1946. Two of the dissenting Justices in Kurth Ranch, who voted for the result in Austin, expressly reaffirmed the more limited formulation reflected in Halper's holding. See id. at 1952 (Rehnquist, C.J., dissenting) ("[T]he proper inquiry is * * * whether [the tax] is so high that it can only be explained as serving a punitive purpose"); id. at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective").

In addition, while Austin relied on several factors in concluding that the forfeiture of instrumentalities of drug crimes is sufficiently punitive to trigger

States Coin & Currency, 401 U.S. 715, 718 (1971), the Court characterized forfeiture as "criminal in nature" for purposes of determining whether a claimant in a forfeiture action could invoke the Fifth Amendment privilege against self-incrimination. See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700-702 (1965) (finding, in light of forfeiture's role as a penalty, that Fourth Amendment's exclusionary rule applies). Subsequently, however, in One Lot Emerald Cut Stones and 89 Firearms, the Court reaffirmed the rule that in rem forfeitures serve substantial remedial ends and do not constitute punishment for double jeopardy purposes.

Eighth Amendment scrutiny, those factors have never traditionally been held sufficient to brand such forfeitures as punitive for purposes of the Double Jeopardy Clause. For example, while a statutory innocent-owner defense is of relatively recent vintage, equivalent administrative mitigation remedies that depend on the absence of "willful negligence" on the part of property owners have been available since 1790. See Calero-Toledo, 416 U.S. at 689 n.27. Similarly, a historical understanding of a particular sanction as "punishment" is one of the several Mendoza-Martinez factors that this Court in 89 Firearms concluded was not implicated by an in rem forfeiture. See 89 Firearms, 465 U.S. at 365 & n.7. Finally, while forfeitures of "facilitating property" are tied to the commission of certain crimes, their scope is much broader because they apply to property "intended" to be used in those crimes even if such an "intent" is not itself a crime. Cf. id. at 363-364. In any event, under Halper the last-mentioned factor merits minimal weight in the double jeopardy calculus, because in that case the defendant became liable for a civil penalty only after engaging in conduct that also constituted a crime, see United States v. Halper, 490 U.S. at 438; see also United States ex rel. Marcus v. Hess, 317 U.S. at 549; Murphy v. United States, 272 U.S. 630, 632 (1926) (Holmes, J.), yet the Court nevertheless concluded that a civil penalty amounts to punishment only when it is so disproportionate to the government's claimed interest in compensation that it cannot rationally be justified, on a case-by-case basis, by reference to that interest. 490 U.S. at 449,11

¹¹ The Court in Austin also consulted the legislative history of the drug forfeiture statutes, noting that the Senate Report

b. Applying Halper, the appropriate case-by-case inquiry in the context of forfeitures of property used to facilitate narcotics crimes is whether the nexus between the particular property and the crime committed or intended is close enough so that the forfeiture may rationally be thought to further one or more of the remedial goals that traditionally have justified that in rem remedy. Those goals are (1) inducing owners to exercise all reasonable care in managing their property, see, e.g., Calero-Toledo, 416 U.S. at 687-688; Van Oster, 272 U.S. at 467-468; (2) abating a nuisance or wrong, 22 see, e.g., Dob-

had characterized the forfeiture of real property used for drug storage or manufacture as a "powerful deterrent." 113 S. Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)). As we argue above, however, the presence of some deterrent objective should not result in civil forfeiture being deemed categorically punitive for double jeopardy purposes.

19 The reported cases provide graphic examples of the use of 21 U.S.C. 881(a) (7) to meet this traditional objective of in rem forfeitures. In United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), nearly an entire apartment building was used to sell crack cocaine, and persistent efforts to compel the legal owners of the building to remedy the situation had failed. See id. at 873. Similarly, conveyances forfeitable under 21 U.S.C. 881 (a) (4) may be specially adapted to smuggle drugs, and the removal of such a conveyance from commerce undeniably serves a remedial purpose. See United States v. One 1983 Homemade Vessel Named "Barracuda", 858 F.2d 643 (11th Cir. 1988); cf. United States v. Chandler, 36 F.3d 358, 364 (4th Cir. 1994) ("Forfeiture of a \$14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness"), cert. denied, 115 S. Ct. 1792 (1995).

bin's Distillery, 96 U.S. at 400; United States v. Cargo of Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844); and (3) "insuring an indemnity to the injured party," United States v. Cargo of Brig Malek Adhel, 43 U.S. (2 How.) at 233; see Republic National Bank v. United States, 506 U.S. 80, 87 (1992) (in rem forfeiture developed, in part, "to furnish remedies for aggrieved parties"). The last objective -compensating an injured party-extends as well to the government, see United States ex rel. Marcus v. Hess, 317 U.S. at 551, which may fairly ask that each person whose property contributes to the harms caused by drug trafficking also contribute to defraying the government's costs of enforcement and the societal harms created by that activity. Cf. Halper, 490 U.S. at 446 n.6 (government may recover its "investigative and prosecutorial costs"): Kurth Ranch, 114 S. Ct. at 1953-1954 (O'Connor, J., dissenting); United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir.) (government may be allowed "[a] reasonable allocation of more generalized enforcement costs-in the nature of overhead"), cert. denied, 506 U.S. 815 (1992).

In general, we believe that the forfeiture of the instrumentalities of crime is a rational means to achieve those remedial goals, and that it would take a "rare case," *Halper*, 490 U.S. at 449, to establish otherwise.¹³ Such a rare case might occur if

¹⁸ In the course of its Eighth Amendment analysis, the Austin Court did express doubt that, as a categorical matter, the forfeiture of instrumentalities of crime could be characterized as remedial. 113 S. Ct. at 2811. The Court declined to equate conveyances and buildings involved in drug crimes

extremely valuable property were minimally involved in the offense, such that the forfeiture would be rationally explicable only on the basis that it is intended to impose punishment for the purposes of the Double Jeopardy Clause. Short of that situation, however, a court should not reach the conclusion that a forfeiture of facilitating property is punitive for double

jeopardy purposes.

In light of those principles, respondent Ursery cannot meet his initial burden (United States v. Halper, 490 U.S. at 449) of establishing that the government's action in seeking forfeiture of his property was apparently punitive. Because respondent used the property for several years to process and distribute a controlled substance, it significantly furthered the harms occasioned by drug trafficking. And because respondent made no showing that a forfeiture valued at \$13,250 represented a recovery "exponentially" in excess of the government's likely costs of enforcement, see id. at 445, the government's action in seeking its forfeiture appears rationally to serve the traditional remedial goals of in rem forfeiture. Nothing in that action, therefore, suggests that the

forfeiture could rationally be explained only as an

attempt to inflict punishment.

2. The forfeiture of proceeds is not punishment. Even if the Court disagrees with our submission that Austin does not control the punishment question presented in Ursery, and holds that the civil action in that case inflicted "punishment" for double jeopardy purposes, we believe that a different conclusion nonetheless is required in \$405,089.23. The district court in that case granted summary judgment in our favor on the ground, among others, that the assets at issue were "proceeds" of narcotics trafficking. See Pet. App. 3a-4a. As a plurality of this Court recognized in 92 Buena Vista Ave., supra, statutes authorizing the forfeiture of "proceeds" are a recent development in forfeiture law. See 113 S. Ct. at 1133-1134 & n.16 (noting that first such statute was enacted in 1978). Accordingly, Austin's historical analysis of in rem forfeitures as being "in part" punitive (113 S. Ct. at 2810) does not speak to this category of relief sought by the government.

The "forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property." United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994); cf. 92 Buena Vista Ave., 113 S. Ct. at 1133 n.15 (noting that "stolen property—the fruits of crime—was always subject to seizure" under the Fourth Amendment); Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 626 (1989) ("[T]he Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense"). When the government forfeits

to "contraband," and it found that the value of the property forfeitable on an instrumentality theory has no correlation to the harm caused by the underlying offense or to the costs of law enforcement. Id. at 2811-2812. On the case-by-case analysis applicable in the double jeopardy multiple punishments setting, see United States v. Halper, 490 U.S. at 452, however, the forfeiture of particular property may be integrally tied to the eradication of drug crime (see note 12, supra), and the nexus between the property's value and the costs of law enforcement may provide the "rough remedial justice," id. at 446, to which the government is entitled. Those purposes would characterize the forfeiture as remedial.

such proceeds, it does no more than prevent unjust enrichment, a plainly remedial goal. See, e.g., United States v. Carson, 52 F.3d 1173, 1182-1183 (2d Cir. 1995) (disgorgement order in civil RICO case is not "punishment" for double jeopardy purposes because "[d]isgorgement, by design, is compensatory"), cert. denied, No. 95-6929 (Feb. 20, 1996); SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement of profits made during securities law violation is purely remedial); see also Rex Trailer Co. v. United States, 350 U.S. 148, 153-154 & n.6 (1956). Any other view would lead to the absurd result that a bank robber who is arrested as he exits the bank. and from whom the stolen money is seized at that time, may not thereafter be prosecuted for the robberv.

As the Fifth Circuit has explained,

[w]hen * * * the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. * * * The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.

United States v. Tilley, 18 F.3d at 300; accord United States v. Salinas, 65 F.3d 551, 553-554 (6th Cir. 1995) (following Tilley); United States v. \$184,505.01, 72 F.3d 1160 (3d Cir. 1995) (same); see also United States v. Clementi, 70 F.3d 997, 999-1000 (8th Cir. 1995) (rejecting Ninth Circuit's analysis); but see United States v. 9844 South Titan

Court, No. 94-1285, 1996 WL 49002 (10th Cir. Feb. 5, 1996). Moreover, while the Court was not persuaded in Austin that lawfully acquired property that is used merely to facilitate a crime should be viewed as contraband, property received in exchange for controlled substances bears a much closer nexus to the illegality and may, as Judge Rymer argued below, fairly be characterized as "the functional equivalent of contraband," 95-346 Pet. App. 27a, the forfeiture of which is "remedial." Austin v. United States, 113 S. Ct. at 2811. Finally, as the Seventh Circuit recently recognized,

proceeds forfeitures can never be out of proportion to the "loss" suffered by the government or society. If there has been a finding that certain property, for instance, is forfeitable pursuant to § 881[a](6) as proceeds of drug trafficking, it is directly equal to that part of the profits with which it was purchased. It directly represents at least a portion of the profits and can thus be less than or equal to society's loss, but not more than the loss. * * * That being the case, the forfeiture of proceeds acquired from drug dealing can hardly be termed punishment.

Smith v. United States, No. 95-2259, 1996 WL 72858, at *3 (Feb. 21, 1996).

For these reasons, the Ninth Circuit's conclusion that the forfeiture of the proceeds that respondents obtained from years of drug dealing is punishment simply "has to be wrong." 95-346 Pet. App. 28a (Rymer, J., dissenting from denial of rehearing). Instead, the forfeitures at issue in \$405,089.23 are remedial, and they cannot constitute punishment under the Double Jeopardy Clause.

- D. If Civil In Rem Forfeiture Amounts To An "Offense" For Which Respondents Were Placed In Jeopardy, It Is Not The "Same Offense" As The Crimes For Which They Were Prosecuted
- 1. The Double Jeopardy Clause prohibits multiple punishments or successive prosecutions only for the "same offence." The test for determining whether two offenses are the "same" for double jeopardy purposes is the "statutory elements" test set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." See also Brown v. Ohio, 432 U.S. 161, 166 (1977) ("Th[e] [Blockburger] test emphasizes the elements of the two crimes"). Accordingly, if each statute at issue "requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); see also United States v. Felix, 503 U.S. 378, 386 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation"); Albernaz v. United States, 450 U.S. 333, 338 (1981). The Blockburger test applies in both the multiple punishments and successive prosecutions contexts. See United States v. Dixon, 113 S. Ct. at 2856; Witte v. United States, 115 S. Ct. at 2204.
- 2. A straightforward application of the *Block-burger* test compels the conclusion that, if civil forfeiture amounts to an "offense" that triggers double

jeopardy protections, as both the Sixth and Ninth Circuits have held, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of the offenses on which respondents were convicted. Each of the forfeiture statutes requires proof that the defendant property played some role in the commission of a crime. Section 981(a) (1) (A) provides for the forfeiture of "property * * * involved in a transaction or attempted transaction," in violation of four money laundering statutes. Section 881(a)(6) authorizes the forfeiture of money "furnished or intended to be furnished" in connection with, "traceable to," or "used or intended to be used to facilitate" a drug trafficking crime. Similarly, Section 881(a)(7) requires proof that the defendant real property was "used, or intended to be used, * * * to commit, or to facilitate the commission of," a drug crime.

The respondents in \$405,089.23 were convicted of conspiracy to commit drug offenses, in violation of 21 U.S.C. 846; possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371; and money laundering, in violation of 18 U.S.C. 1956. The respondent in Ursery was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). None of those statutes requires proof that any property was used in or generated by the offense. Because each of the forfeiture statutes does require that element of proof, each contains an element that the criminal statutes do not.

Each of the criminal statutes also requires proof of at least one element not found in the forfeiture statutes. Conviction on the criminal charges required

proof that respondents participated in a conspiracy, possessed a controlled substance with the intent to distribute it, or engaged in unlawful money laundering transactions. By contrast, the forfeiture statutes do not require proof of any particular crime, or proof of the participation of the property owner in the offenses that supported the forfeiture, much less proof that the owner entertained a mental state required for a criminal conviction.14 See Origet v. United States, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offence may be an entirely different person from the owner of the merchandise, or any person interested in it"); United States v Chandler, 36 F.3d 358, 362 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). Indeed, because the government may obtain forfeiture under Section 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

For those reasons, there is no force to the Ninth and Sixth Circuits' view that, since forfeiture statutes "incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994); see also 95-345 Pet. App. 12a. Greater- and lesser-included offenses are the "same" for double jeopardy purposes because such of-

fenses do not satisfy the Blockburger test. As this Court has made clear, one statute does not define a lesser-included offense of another unless every violation of the statute defining the greater offense "necessarily entails a violation of" the statute defining the lesser offense. United States v. Woodward, 469 U.S. 105, 107 (1985) (per curiam) (emphasis added); Brown v. Ohio, 432 U.S. at 168 (offense is lesserincluded under Blockburger if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); see also Schmuck v. United States, 489 U.S. 705, 716, 719 (1989). Because that quite clearly cannot be said of the purportedly "greater" civil forfeiture "offenses" at issue here, the courts below erred in concluding that those offenses are the "same" as the crimes for which respondents were convicted.18

¹⁴ Thus, for example, an owner of property may be legally innocent of the crime that gives rise to the civil forfeiture, but be unable to meet the requirements of the statutory innocent-owner defense.

¹⁸ Apart from misapplying the "elements" test of the Blockburger decision (i.e., whether the "offenses" are the same in law), the Sixth Circuit in Ursery also ignored a second, and equally dispositive, aspect of the Blockburger decision, viz., whether the offenses at issue are the same in fact. While the better-known holding of Blockburger is addressed to the former question, that case also held that repeated violations of the same statute (which obviously would be the same offense under the "elements" test) are still different "offenses" if each resulted from a fresh "impulse," Blockburger V. United States, 284 U.S. at 301-303; see also United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224-225 (1952); id. at 220 n.3 (referring to that aspect of Blockburger as addressing what the "unit of prosecution" is). Respondent Ursery was not charged with, or convicted of, manufacturing marijuana based on any theory that he grew the plants on his property, or that he did so more than once, but rather on the basis that he did so in property belonging to one of his neighbors and on a specific date—July 30, 1992. As Judge Milburn noted in dissent (95-345 Pet. App. 26a-27a; see also

E. If Respondents Were "Punished" By The In Rem Civil Forfeiture Proceedings For The Same Offenses That Led To Their Criminal Convictions, That Punishment Occurred In The "Same Proceeding" As The Punishment Imposed By The Criminal Judgments

Even if the forfeitures in these cases constituted "punishment" for the offenses for which the claimants were convicted, the "Double Jeopardy Clause simply is not implicated" if the criminal action was part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." United States v. Halper, 490 U.S. at 450; see also Missouri v. Hunter, 459 U.S. at 368-369. The Ninth Circuit concluded that parallel civil forfeitures and criminal convictions, being separately docketed and tried, can never be the same proceeding. 95-346 Pet. App. 7a-12a. The Sixth Circuit did not "fully adopt" the Ninth Circuit's approach, but it did hold that the civil and criminal actions were separate proceedings because they were filed four months apart, ended in formally separate judgments entered by different judges, and were not coordinated by the government attorneys involved. 95-345 Pet. App. 16a.

The courts below misapprehended the significance of *Halper*'s reliance on the existence of "separate" proceedings. Because the multiple punishments doctrine protects a criminal defendant's legitimate "ex-

pectation of finality in the original sentence," United States v. DiFrancesco, 449 U.S. at 139; id. at 137; Pennsylvania v. Goldhammer, 474 U.S. at 30; see also United States v. Fogel, 829 F.2d 77, 83-88 (D.C. Cir. 1987) (Bork, J.), a proceeding is impermissibly successive for purposes of that doctrine only when it is commenced after that expectation of finality has ripened. As demonstrated by this Court's cases upholding the government's authority to appeal criminal sentences, the time at which that expectation ripens has nothing to do with whether an increase in the defendant's sentence is ordered by a different judge, is procured by a different government attorney, or is ordered under the caption of a new docket number. Those are common occurrences upon the hearing of any sentencing appeal, and they do not render the appeal a "separate" proceeding at which punishment is impermissibly increased.

Indeed, Halper itself compels the conclusion that such factors cannot control whether a proceeding is impermissibly successive for purposes of the multiple punishments inquiry, because the Court expressly stated that "[n]othing in [its] ruling" would preclude the government from obtaining a "civil penalty" and "criminal penalties in the same proceeding." 490 U.S. at 450. Because civil and criminal actions cannot be (and never have been) joined together in a single trial under our system of justice, see United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); see also United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Smith, No. 95-1568, 1996 WL 34552 (8th Cir. Jan. 31, 1996), slip op. 6, Halper itself casts considerable doubt on the

id. at 29a), the civil forfeiture action, by contrast, was based on respondent's use of his own property to facilitate the processing and distribution of marijuana over the period of "several years" that concluded with the search of his residence.

Ninth and Sixth Circuits' approach to the question. And because *Halper* specifically contemplated that the government could seek *both* civil and criminal penalties, that case also answers the Ninth Circuit's suggestion (95-346 Pet. App. 22a) that this Court's cases effectively require the government to elect whether it will proceed criminally or civilly. The circuit is a suggestion of the court is cased as a suggestion of the circuit is a suggestion of the ci

³⁶ Even in the context of purely criminal proceedings, it is not invariably true that formally separate criminal trials involving the same offense amount to "separate" proceedings that trigger double jeopardy protections. See *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984) (two-tier state system, even if "technically" resulting in two trials, "can be regarded as * * * a single, continuous course of judicial proceedings" that does not implicate the concerns of the Double Jeopardy Clause); see also *Ohio v. Johnson*, 467 U.S. 493, 500-501 (1984) (no double jeopardy violation to continue prosecution on remaining charges in indictment after defendant chose to plead guilty to lesser-included offenses).

17 The Ninth Circuit suggested that the government could have sought criminal forfeiture under 18 U.S. 982 and 3554 and 21 U.S.C. 853, and simply added a forfeiture count to the criminal indictment, 95-346 Pet. App. 8a-9a. The issue, however, is whether the Double Jeopardy Clause requires that the government do so, not whether the government might, in future cases, find ways to mitigate the Ninth Circuit's erroneous interpretation of the Constitution. Moreover, the vast majority of civil forfeiture statutes have no criminal forfeiture analogue. See U.S. Dep't of Justice. Compilation of Selected Federal Asset Forfeiture Statutes (Aug. 1995). As a practical matter, the Ninth Circuit's analysis requires the government to choose between a criminal sentence of imprisonment or fine, on the one hand, and civil forfeiture, on the other, even though Congress quite clearly intended for both to be available.

In any event, the Ninth Circuit overlooked the fact that forfeiture under those provisions is an in personam action

As with other double jeopardy questions, the relevant inquiry instead is whether the government's conduct "constitute[s] 'governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 310 (1984) (quoting United States v. Scott, 437 U.S. at 91); accord Ohio v. Johnson, 467 U.S. 493, 502 (1984); United States v. DiFrancesco, 449 U.S. at 142. In the context of the interests protected by the multiple punishments doctrine, that type of "oppression" occurs only when the government defeats the defendant's legitimate expectation of finality. The facts of these cases make clear that respondents were well aware that the government intended to seek a full complement of statutorily authorized remedies in civil and criminal actions that were basically contemporaneous. Thus, respondents had actual notice that the criminal sentence would not be the sole sanction sought by the government on the basis of their criminal conduct, and thus they could not reasonably have formed any expectation to the contrary. For that reason, the facts of these cases do not implicate Halper's basic concern that the government is seeking to disturb an

that does not uniformly achieve the ends that Congress envisioned for in rem forfeitures. For example, because an in personam forfeiture must be obtained in a criminal trial, it is not available when the criminal defendant/property owner is a fugitive from justice, whose trial may not proceed in absentia. See Crosby v. United States, 506 U.S. 255 (1993). Thus, under the ruling below, if a fugitive owns a crack cocaine-infested tenement, the government has the choice of abating the nuisance through a civil proceeding in rem, but only if it is willing to risk granting him immunity from prosecution in the event he ultimately is caught.

otherwise final criminal judgment because "it is dissatisfied" with the criminal sentence received by the defendant. *United States* v. *Halper*, 490 U.S. at 451 n.10; see also *United States* v. *Smith*, slip op. 6.

Indeed, the facts of these cases conclusively show that the government did not commence separate civil and criminal actions to defeat any expectation of finality to which respondents were legitimately entitled by virtue of the Double Jeopardy Clause. In \$405,098.23, the government filed the forfeiture complaint five days after the claimants were charged in a superseding indictment with drug-trafficking and moneylaundering offenses. Far from viewing that dual filing as an abusive tactic warranting legal relief, respondents discussed the appropriateness of staying the civil action pending the outcome of the criminal case (95-346 Pet. App. 51a). They thus evidenced not only their own inability to discern any double jeopardy injury from the government's dual filings (to which they did not object at all until the case was on appeal, see id. at 5a n.1) but also their willingness to deal with the criminal and civil actions seriatim. Cf. Jeffers v. United States, 432 U.S. 137, 154 (1977) (plurality opinion of Blackmun, J.).

Similarly, respondent in *Ursery* was indicted in February 1993, four months after the civil forfeiture action was commenced and long before the outcome of either case could be known. He likewise did not see in the parallel actions any danger to his double jeopardy rights. To the contrary, he elected to settle the forfeiture action, with full knowledge of the pendency of the criminal prosecution, and then stood trial on the criminal charges without raising any double jeopardy issue. It was not until after he was

convicted by a jury that he made a double jeopardy claim for the first time. See 95-345 Pet. App. 4a. The unfolding of those events may well suggest that respondent, after concluding a bargain he thought fair and equitable in the civil case and unsuccessfully trying his luck with the jury in the criminal case, turned to the Double Jeopardy Clause for the "sword" (Ohio v. Johnson, 467 U.S. at 502) that might rescue him from "the consequences of his voluntary choice[s]" (United States v. Scott, 437 U.S. at 99). Those events do not, however, bespeak the type of "governmental overreaching that double jeopardy is supposed to prevent." Ohio v. Johnson, 467 U.S. at 502.

CONCLUSION

The judgments of the courts of appeals should be reversed.

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Respectfully submitted.

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibited the government from prosecuting respondent for manufacturing marijuana, where that prosecution was separate from, and subsequent to, the government's civil forfeiture of respondent's property, under 21 U.S.C. 881(a)(7), based on his use of the property to facilitate the manufacture of marijuana.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

V.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

V.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF FOR RESPONDENT GUY JEROME URSERY

OPINIONS BELOW

The opinion of the court of appeals in No. 95-345 (95-345 Pet. App. 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (95-345 Pet. App. 38a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1995. The petition for a writ of certiorari was filed on August 28, 1995, and was granted on January 12, 1996 (J.A. 81a-82a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841 and 881 are reproduced in the appendix to the petition for certiorari.

STATEMENT

After executing a search warrant for respondent's premises, police officers found evidence that respondent was growing, processing, and consuming marijuana at or nearby his home in rural Michigan. For that offense, the United States first forfeited nearly half of respondent's equity in his home (under 21 U.S.C. 881(a)(7)) and later convicted and sentenced respondent to 63 months in prison. The court of appeals, faithfully applying this Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), held that the prosecution and sentence violated the "multiple punishments" component of the Double Jeopardy Clause. It therefore reversed respondent's conviction and vacated his sentence.

1. On July 30, 1992, some 15 officers of the Michigan State Police executed a search warrant at respondent's home in a rural part of Shiawassee County, Michigan. Pet. App.

2a; J.A. 36; Tr. 108. In the course of the search, the officers seized 142 marijuana plants that were growing in six plots — three plots that were 25 feet outside respondent's property line, and three that were 150 feet outside the property line. Pet. App. 2a. The officers also seized from respondent's residence several plastic bags filled with marijuana seeds, some marijuana stems and stalks, a growlight, and two firearms. *Ibid*.

The United States thereafter commenced a civil forfeiture action, seeking to forfeit the residence and surrounding real property owned by respondent and his wife. In an affidavit submitted in support of a seizure warrant on September 30, 1992, Special Agent Christopher J. Hackbarth recited the same allegations contained in the earlier search warrant—that respondent had used the property to grow marijuana plants; that he had dried the plants on a woodpile in his backyard; and that he had stored the plants in a crawl space inside his house. J.A. 38, 76.

Based on those allegations, the affidavit asserted that respondent had used the property to facilitate the manufacture of marijuana, in violation of 21 U.S.C. 881(a)(7). J.A. 73-75, 80. Section 881(a)(7) generally authorizes the forfeiture of "[a]ll real property * * * which is used * * * to facilitate the commission of" any narcotics felony under Title 21. The affidavit recited that there was a mortgage on the property in the amount of \$41,000 — which left respondent equity of about \$29,000. J.A. 79; October 7, 1992 appraisal letter from Dean M. Helsom to the United States Marshals Service. The government served the seizure warrant for respondent's property on October 2, 1992. Pet. App. 3a.

The forfeiture action was thereafter brought before Judge Lawrence Zatkoff of the United States District Court for the

All references to "Pet. App." are to the Petition Appendix in No. 95-345.

Eastern District of Michigan and placed on the court's civil docket. Pet. App. 3a. Judge Zatkoff conducted a scheduling conference on November 9, 1992, and scheduled trial for July 1993. Pet. App. 3a. Over the course of the ensuing months, the parties conducted discovery and prepared for trial: respondent served interrogatories and document requests in December 1992 (J.A. 25); he litigated a motion to compel discovery in January 1993 (*ibid.*); and the parties exchanged witness lists for trial by February 4, 1993 (J.A. 26-27).

On May 17, 1993, respondent and his wife entered into a stipulation consenting to a judgment of forfeiture. Pet. App. 32a-34a. Under the stipulation, respondent and his wife agreed to pay the United States \$13,250, and in return the government agreed to discharge the Lis Pendens it had filed against the property. Pet. App. 33a. The stipulation reiterated that the action had been commenced under 21 U.S.C. 881(a)(7), and provided that, for purposes of the settlement, respondent and his wife did "not contest that * * * the United States and or its agents had reasonable cause for the seizure of [the] property." Pet. App. 32a, 34a.

On May 24, 1993, Judge Zatkoff entered judgment pursuant to the stipulation. Pet. App. 35a-37a. The Urserys paid the judgment in full on June 17, 1993. Pet App. 3a.

2. On February 5, 1993 — with discovery completed and trial witness lists exchanged in the forfeiture action — a federal grand jury in the Eastern District of Michigan returned a one-count indictment against respondent. J.A. 28. The indictment charged that on or about July 30, 1992 — the date the search warrant was executed — respondent had manufactured marijuana, in violation of 21 U.S.C. 841(a)(1). J.A. 28. On reassignment from Judge Stewart A. Newblatt, the case was assigned to Judge Avern Cohn and set for trial on June 30, 1993. Pet. App. 3a.

Viewed in the best light for the government, the evidence at trial showed that over a two-year period respondent and his family had maintained six plots of marijuana plants about 25-150 feet beyond their property line. Pet. App. 2a. But as the trial court observed just before summations, "one of the interesting aspects of this case is the government has made no effort to suggest that [respondent] wasn't going to use this [marijuana] for his own purpose." Tr. 292. Indeed, the government never once argued that respondent's manufacturing of marijuana was for any purpose other than his family's consumption. As the prosecutor asserted in summation: "Why did the defendant grow the marijuana? Because he used this marijuana." Tr. 303.

Consistent with that theory, the government offered testimony showing that, at various times in 1991 and 1992, respondent kept marijuana plants both inside and outside his house. According to Heather McPherson — the informant for the search warrant and former fiancée of respondent's son Brian (Tr. 135, Pet. App. 2a) — respondent occasionally processed plants in his freezer and in his microwave oven (Tr. 145). Respondent also hung plants on hooks in a crawl space beneath the floor in the master bedroom closet. Tr. 147. To corroborate that testimony, the government offered the physical evidence seized from the residence on July 30, 1992 (Tr. 27), including marijuana seeds (Tr. 32), plastic baggies (Tr. 36), marijuana stalks and stems (Tr. 40, 42-44, 46), and a growlight (Tr. 45).

Following a three-day trial, respondent was convicted on the sole count of the indictment. Pet. 3a. Relying on Austin v. United States — which had been decided only two days before the trial began — respondent filed a post-trial motion to dismiss the criminal case on double jeopardy grounds. Ibid. In a terse order issued on September 13, 1993, the district court denied the motion. Pet. App. 38a-41a. The court stated that "[t]he forfeiture proceeding was settled by a consent judgment" and was therefore "not an adjudica-

tion." Pet. App. 39a. Moreover, the court held, "thee for-feiture proceeding and the criminal conviction were 'paart of a single, coordinated prosecution of [a] person involved in alleged criminal activity.'" *Ibid.* (citation omitted). Accordingly, Judge Cohn stated, "[w]hile the Court is surprised that the Government proceeded with its forfeiture action before obtaining an indictment, it nevertheless recognizes that such a single coordinated prosecution does not give rise to double jeopardy." Pet. App. 39a. On January 19, 1994, JJudge Cohn sentenced respondent to a term of imprisonment ffor 63 months. Pet. App. 4a.

App. 1a-27a. The court explained that "'[t]he Double Jeopardy Clause protects against three distinct abusees: a second prosecution for the same offense after acquitttal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'" Id. at 5a ((quoting United States v. Halper, 490 U.S. 435, 440 (1989)). "To decide whether the government has violated [reespondent's] constitutional right," the court addressed "threee key determinations: (1) whether the civil forfeiture in the iinstant case constitutes 'punishment' for double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for the same offense; and (3) whether thee civil forfeiture and criminal prosecution are separate proceedings." Pet. App. 5a-6a (emphasis in the original).

The court first held that the forfeiture of respondent's property under 21 U.S.C. 881(a)(7) constituted "ppunishment." Pet. App. 9a-11a. The court of appeals obsserved that, under this Court's *Halper* decision, "'a civil saunction that cannot fairly be said solely to serve a remedial puurpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* at 10a (quoting *Halper*, 490 U.S. at 448) (emphasis deleted). Moreover, thee court noted that under *Austin* v. *United States*, 113 S. Ctt. 2801

(1993), civil forfeitures pursuant to 21 U.S.C. 881(a)(7) are punishment, for purposes of the Excessive Fines Clause of the Eighth Amendment, because they do not "serve solely a remedial purpose." Pet. App. 10a. The court of appeals accordingly concluded that "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." Pet. App. 11a.

Applying the rule in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court next held that respondent had been twice punished for "the same offense." Pet. App. 11a-13a. The court explained (id. at 12a) that, under Section 881(a)(7), the government may forfeit any property used to commit "'a violation of this subchapter.'" Because "the government cannot confiscate [respondent's] residence without a showing that he was manufacturing marijuana," it follows that "[t]he criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." *Ibid*. Accordingly, the court held, "the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense." *Ibid*.

Finally, the court held that respondent had been punished in "separate proceedings." Pet. App. 13a-18a. The court found that "the facts in this case fail to reveal * * * a single, coordinated proceeding." Id. at 16a. In particular, the court noted (ibid.):

[T]he record reveals no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution as a coordinated proceeding. Moreover, as government counsel made clear at oral argument, there has been no communication between the government attorneys who handled [respondent's] criminal prosecution and those who handled the civil forfeiture action. The civil forfeiture proceeding and the criminal proceeding were instituted four months

apart, presided over by different judges, and resolved by separate judgments.

Judge Milburn dissented. Pet. App. 19a-27a. In his view, the forfeiture and prosecution in this case were part of a single, coordinated proceeding because there was no "potential for government abuse of process; the government instituted and pursued both proceedings against defendant before it knew the outcome of either case." *Id.* at 20a, 22a-23a. Judge Milburn also concluded that respondent had not been punished for the same offense: whereas the forfeiture action was based on the use of respondent's property in manufacturing marijuana "over the course of several years," the "indictment charged defendant only with the manufacture of a controlled substance during 1992." *Id.* at 27a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over some period of time culminating on July 30, 1992, Guy Jerome Ursery grew marijuana plants on six plots, harvested the crop, and manufactured marijuana for his family's personal use. That was assuredly an offense, for which respondent was subject to punishment. And punished he was — not once, but twice: first, when nearly half respondent's equity in his house and land was forfeited; and second, when he was criminally prosecuted, convicted, and sentenced to more than five years in prison. In each case, the "offense" was the same: respondent's manufacture of marijuana. And the two punishments were imposed in separate proceedings: one civil, the other criminal; each before a different judge; and the second instituted more than four months after the first, as the parties were readying themselves for trial on the government's forfeiture claim.

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States

v. Halper, 490 U.S. 435, 440 (1989). Accord Ohio v. Johnson, 467 U.S. 493, 498-499 (1984); Illinois v. Vitale, 447 U.S. 410, 415 (1980); Abney v. United States, 431 U.S. 651, 660-661 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Moreover, with respect to the "multiple punishments" component, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being twice put in jeopardy for such punishment." Witte v. United States, 115 S. Ct. 2199, 2204 (1995) (emphasis in the original). Thus, the Double Jeopardy Clause prohibits, not only punishing twice, but even "attempting a second time to punish criminally, for the same offense." Ibid. (emphasis in the original). Applying these principles, the court below correctly held (Pet. App. 1a-27a) that, by prosecuting respondent after first forfeiting his property, the government had violated respondent's double jeopardy protection against multiple punishments.

The Solicitor General does not dispute that the Double Jeopardy Clause protects persons against multiple punishments. Nevertheless, for four different reasons, the government maintains that prosecuting, convicting, and sentencing Mr. Ursery did not violate that protection. First, it contends (Br. 36-47) that forfeiting respondent's property did not "punish" him within the meaning of the Double Jeopardy Clause. Second and relatedly, it asserts (Br. 26-36) that, even if Mr. Ursery was punished by the forfeiture, double jeopardy protections do not apply because the forfeiture was imposed before, rather than after, the criminal prosecution. Third, the government argues (Br. 50-53) that, even if respondent was punished twice, the punishments were not for "the same offense." Finally, the government insists (Br. 54-59) that the two punishments were imposed in the "same proceeding."

As we show below, each of those arguments is mistaken.

- A. This Court held in Halper that a civil sanction imposes "punishment" for purposes of the Double Jeopardy Clause if the sanction "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" (490 U.S. at 448 (emphasis added)). Applying that principle, the Court held in Austin that forfeitures of property used to facilitate narcotics felonies under 21 U.S.C. 881(a)(7) constitute punishment, at least in part. It follows that respondent Ursery was "punished" — at least to some extent — when nearly half the equity in his real property was forfeited under Section 881(a)(7) for the offense of manufacturing marijuana. Although the government attempts to distinguish the two cases - and, failing that, to confine them to their facts -Halper and Austin dispositively settle the first issue: Mr. Ursery was punished when his property was forfeited.
- B. It does not matter for double jeopardy purposes that the civil case came first and the criminal case came second, rather than vice versa. If, as *Halper* held, the threat of a civil sanction can (in some cases) violate the Double Jeopardy Clause, that can only be because the action seeking the civil sanction places the defendant in "jeopardy." And whether that civil "jeopardy" comes first or second cannot possibly make a difference. The government's contrary view has been rejected by every court to have considered it and cannot withstand analysis.
- C. Both the forfeiture of respondent's property and his criminal prosecution were for "the same offense" manufacturing marijuana. By its terms, Section 881(a)(7) authorizes forfeiture of any property used to commit (or facilitate the commission of) any narcotics felony, including manufacturing marijuana. Forfeiture is thus the punishment for a "greater offense" (using property to commit a narcotics felony), and the manufacturing felony is "a species of lesser-

included offense" (Illinois v. Vitale, 447 U.S. 410, 420 (1980)) within the forfeiture. As such, the incorporated narcotics felony cannot be separately prosecuted (under Blockburger) once the defendant has already been punished for the greater "offense." Nor does it matter, in that regard, that the greater offense (here, using property to commit a narcotics felony) could have been based on a different predicate (say, money laundering). Under this Court's cases, the lesser-included offense analysis must focus on the government's actual prosecution of the defendant — not some theoretical prosecution the government might someday pursue. Here, the forfeiture was explicitly based on the very same crime for which Mr. Ursery was subsequently prosecuted.

D. The prosecution and the forfeiture action were "separate proceedings." The two actions had all the conventional earmarks of separate proceedings: different judges, different dockets, different schedules, different natures (one civil, one criminal), and different beginning and ending dates. Moreover, the government capitalized on these differences to extract important strategic advantages: it pursued the forfeiture case just long enough to obtain respondent's trial witness list - which it could never have gotten in federal criminal discovery - before commencing the criminal case. In addition, unlike the cases on which the government relies, the separation of the two proceedings in this case was instigated by the government, not by respondent. By subjecting Mr. Ursery to two partly successive, partly contemporaneous — but in all events separate — penal proceedings, the government engaged in precisely the kind of oppression and harassment that the Double Jeopardy Clause is designed to prevent.

ARGUMENT

RESPONDENT'S CRIMINAL PROSECUTION FOR MANUFACTURING MARIJUANA WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE

A. The Civil Forfeiture Of Respondent's Property Under 21 U.S.C. 881(a)(7) Constituted "Punishment" For Purposes Of The Double Jeopardy Clause

Respondent forfeited to the United States nearly half the equity in his home and real property (J.A. 79). As framed by the forfeiture complaint and stipulation for entry of judgment (Pet. App. 28a-31a, 32a-34a) — and accordingly as found by Judge Zatkoff in entering a judgment on consent (id. at 35a-37a) — the property was forfeited under 21 U.S.C. 881(a)(7) because it was used by respondent "to facilitate the unlawful processing" of marijuana. Respondent and his wife duly paid the forfeiture about three weeks after judgment was entered. Pet. App. 3a.

This Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), leave no doubt that the forfeiture of respondent's property constituted "punishment" for purposes of the Double Jeopardy Clause. Although the government struggles mightily to find some daylight between this case and *Halper* and *Austin*, the distinctions it draws are completely artificial. In the end, although the government is too reticent to say so, it really just wants those cases overruled. But the government has failed to offer any reason to overrule *Halper* and *Austin*, much less the "compelling justification" required by this Court. See *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989).

1. The defendant in Halper was the target of a civil False Claims Act (31 U.S.C. 3729-3731) lawsuit following his

prosecution, conviction, and sentencing on 65 counts arising from false reimbursement claims he had submitted to the United States. Although the false claims had caused a loss to the United States of only \$585, in the subsequent civil action Halper was subject to a statutory penalty of more than \$130,000. The question presented in *Halper* was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The Court unanimously held that it could.

The Court began by rejecting the government's contention that a sanction could be punitive only if Congress expressly said it was. 490 U.S. at 447. The Court explained that "while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid.* "This constitutional protection," the Court emphasized, "is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Ibid.*

A civil sanction constitutes punishment, the Court stated, "when the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at 448. In particular, the Court held (*ibid*. (emphasis added)):

a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

In view of the "disproportionate" relationship between Halper's potential civil penalty and the apparent costs to the government arising from Halper's conduct, the Court concluded (id. at 452) that the civil sanction might well constitute punishment. It remanded the case to afford the government an opportunity to show that its actual costs were higher than the district court had surmised. *Ibid*.

The government reads *Halper* very differently (Br. 37-39). Taking one of the statements in the case wholly out of context, the government asserts (Br. 37) that under *Halper* a civil sanction is punitive when it can be characterized "only as a deterrent or retribution.'" Accordingly, the government asserts (*ibid*.), "a dominant remedial purpose renders a sanction nonpunitive for purposes of the Double Jeopardy Clause, even if the sanction could also be said, in some respects, to act as a deterrent."

That is not at all what *Halper* says. Indeed, although it relegates the relevant text to a footnote (Br. 38 n.6), the government acknowledges (Br. 38) that there is at least "[s]ome language in *Halper*" that makes clear that a civil sanction is necessarily punitive (at least in part) when it cannot be *fully* accounted for in non-punitive terms. That "language" is in fact the very holding of the case, and the Court could hardly have made the point more plainly: "[A] civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S. at 448 (emphasis added).

There is simply no trace of the government's "dominant purpose" test in the actual decision in *Halper*. To the contrary, the Court fully recognized in *Halper* that the "dominant purpose" of a civil exaction may well be remedial

and yet the balance of the exaction remain punitive. For example, the Court found it "hardly * * * necessary to state that a suit under the Act alleging one or two false claims" would be permissible; "[i]t is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise." 490 U.S. at 451 n.12. Put another way, at some point the size, scope, or nature of a civil penalty may become so large — so out of proportion to the societal costs imposed by the underlying conduct — that the sanction can no longer be fully explained by its remedial purposes. At that point, the sanction can be understood "only as a deterrent or retribution" — that is, only as punishment, at least in part.³

2. In Austin, 113 S. Ct. 2801, the Court dispelled any doubt about the appropriate framework for determining when a civil sanction constitutes "punishment." The question in Austin was whether the forfeiture of property under 21 U.S.C. 881(a)(4) and (a)(7) — the latter of which is the very provision under which Mr. Ursery's property was forfeited — is "punishment" under the Excessive Fines Clause of the

The Court in *Halper* stated that a sanction is punitive when it "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. But the word "only" in that sentence obviously meant "rather," not "exclusively," as the government seems to believe.

Not long ago, the government itself read *Halper* in just that way. In its amicus brief in *Department of Revenue of Montana* v. *Kurth Ranch*, No. 93-144, the government explained that "[t]he principle guiding" *Halper* was that,

if the measure being challenged as imposing a punishment may serve both penal and non-penal purposes, but the non-penal purposes are insufficient to explain its enactment or application, then the measure must be regarded as punishment. In other words, when analyzing a civil measure that has dual penal and non-penal purposes, the analysis turns on whether the non-penal * * * purposes are insufficient to explain the measure, either in general or in a particular case. If the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

Brief For The United States As Amicus Curiae Supporting Petitioner at 14-15 (footnote omitted).

Eighth Amendment. The Court acknowledged that forfeiture might serve both remedial and punitive purposes; but, as the Court noted, "[w]e need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause." 113 S. Ct. at 2806. So long as a civil sanction "can only be explained as serving in part to punish," it must be regarded, at least to that extent, as punishment. The Court reiterated the rule it had articulated in Halper (490 U.S. at 448): "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving retributive or deterrent purposes, is punishment, as we have come to understand the term." 113 S. Ct. at 2806.

Applying those principles, the Court held that forfeitures effected under 21 U.S.C. 881(a)(4) and (a)(7) do indeed constitute punishment for purposes of the Excessive Fines Clause. The Court observed that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. And the Court discerned "nothing in [21 U.S.C. 881(a)(4) and (a)(7)] or their legislative history to contradict the historical understanding of forfeiture as punishment." Ibid. To the contrary, the Court noted that "[u]nlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an 'innocent owner' defense"; "[t]hese exemptions," the Court added, "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." 113 S. Ct. at 2810-2811.4 In addition, the Court stated, "Congress has chosen to tie forfeiture directly to the commission of drug offenses." Id. at 2811. Finally, the Court pointed out that "[t]he legislative

history of § 881 confirms the punitive nature of these provisions." *Ibid*. "In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," the Court in *Austin* could not "conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose." 113 S. Ct. at 2812. The Court therefore held that a forfeiture under those statutes constitutes "punishment," subject to the limitations of the Excessive Fines Clause. *Ibid*.

Equally important, the Court held, categorically, that forfeitures under Sections 881(a)(4) and (a)(7) invariably constitute "punishment." 113 S. Ct. at 2812 n.14. Unlike the civil sanctions in Halper — which "in the ordinary case . . . can be said to do no more than make the Government whole'" — "[t]he value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) * * * can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." 113 S. Ct. at 2812 n.14. Moreover, the Court reiterated that "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." Ibid.⁵

3. It follows ineluctably from *Halper* and *Austin* that respondent was "punished" when his property was forfeited under 21 U.S.C. 881(a)(7). Cf. *Libretti* v. *United States*, 116 S. Ct. 356, 363 (1995) (under *Austin*, "civil forfeiture

Section 881(a)(7) exempts property from forfeiture "to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

This Court's recent decision in *Bennis* v. *Michigan*, No. 94-8729 (Mar. 4, 1996), does not alter the analysis. True, the Court stated in *Bennis* (slip op. 10) that forfeiture "serves a deterrent purpose distinct from any punitive purpose." But the Court did not retreat in any way from its holdings in *Halper* and *Austin* that where a non-punitive goal (including deterrence) cannot *fully* account for the size and nature of a civil sanction, that sanction is necessarily punitive, at least in part.

authorized by 21 U.S.C. §§ 881(a)(4) and (a)(7) is punitive in nature"). Halper articulated the framework for deciding when a civil sanction is "punishment" for double jeopardy purposes; Austin applied that framework to forfeitures under Section 881(a)(7) and found them invariably to be punitive, at least in part, under the Eighth Amendment; Section 881(a)(7) forfeitures must therefore be "punishment" for double jeopardy purposes as well. Accord United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, 75 F.3d 1470, 1484 (10th Cir. 1996) (under Halper and Austin, "forfeiture constitutes punishment for double jeopardy purposes").

The government evidently recognizes as much, as it devotes most of its argument (Br. 38-43) to a thinly veiled suggestion that Halper and Austin be overruled. Thus, it asserts (Br. 38) that portions of Halper - including, as it happens, the unanimous holding of the case - "sweep too broadly" and articulate "a conception of punishment [that] is not supported by the precedent on which Halper relied." But the government offers no "compelling justification" (Hilton v. South Carolina Public Railways Comm'n, 502 U.S. at 202) for revisiting a unanimous decision that was rendered only seven years ago and that was reaffirmed and reapplied in Austin only three years ago - in an opinion whose relevant portion was not disputed by any Member of the Court. See 113 S. Ct. at 2806; id. at 2813-2814 & n.* (Scalia, J., concurring in part and concurring in the judgment); id. at 2815-2816 (Kennedy, J., concurring in part and concurring in the judgment). And stare decisis, it need hardly be added, is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991); see also Welch v. Texas Department of Highways &

Public Transportation, 483 U.S. 468, 494 (1987); Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986).

True, "the use of the Double Jeopardy Clause to protect against multiple punishments has been questioned." Gov't Br. 31. See Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1955-1960 (1994) (Scalia, J., joined by Thomas, J., dissenting); Witte v. United States, 115 S. Ct. 2199, 2209-2210 (1995) (Scalia, J., joined by Thomas, J., concurring in the judgment). But as the government cannot dispute, this Court has consistently recognized a multiple-punishments component in the Double Jeopardy Clause, most recently just nine months ago in Witte. Indeed, it is arguable that the protection against multiple punishments for a single offense was the primary historical purpose underlying the Clause. As the Court observed in Halper (490 U.S. at 440), the first forerunner of the Clause to appear in the American colonies was paragraph 42 of the Massachusetts "Body of Liberties," adopted by the General Court in 1641: "No man shall be twice sentenced by Civil Justice for one and the same Crime, offense, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910) (emphasis added). Similarly, James Madison's first draft of what became the Double Jeopardy Clause specified that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Cong. 451-452 (1789-1791) (J. Gales ed. 1834) (emphasis added). The change to the more arcane language of the Clause as adopted was not intended to alter Madison's meaning. See J. Sigler, Double Jeopardy 28-33 (1969); Note, Twice in Jeopardy, 75 Yale L.J. 262, 266 n.13 (1965);

Thomas, A Unified Theory of Multiple Punishments, 47 U. Pitt. L. Rev. 1, 3 & n.3 (1985).6

Finally, the government misapprehends (not simply misstates) the holding in *Halper*. *Halper* did *not* holdd, as the government intimates (Br. 38), that "a civil sanction vwith *any* deterrent purpose should be viewed as 'punishment.'" If that were the holding in *Halper*, the extended inquiry inn *Austin* would hardly have been necessary, since, as the government notes (Br. 39), "[t]here are few, if any, civil sanctidons that do not serve in part to deter." Rather, the rule in *Hdalper* is that, if a civil sanction has both punitive and non-punitive purposes, but the non-punitive purposes cannot "solely" justify the nature and scope of the exaction, it follows that the sanction must be punitive, at least in part. The government fails to show how "that formulation would sweep too broadly." Br. 38.

The government also takes aim (Br. 39-43) at Austin, suggesting alternative ways in which the case could have been decided (Br. 40), but of course was not. It also characterizes the case (Br. 42) as outside "[t]he mairinstream of this Court's cases" — a proposition that is diffficult to square with the absence of dissent from the relevant t portion of the opinion. Nor has the government shown that Austin was a departure from past precedents, or that experience

has proved Austin to be unworkable, to sow confusion, or to produce unforeseen or anomalous results.8

The government also argues at length (Br. 41-43) that Austin should not be "exten[ded] * * * to the double jeopardy setting." But there is nothing to "extend" in this case. Austin applied to Eighth Amendment cases the framework devised in Halper explicitly for double jeopardy cases. In any event, it is difficult to see why "punishment" for Eighth Amendment purposes should be different from "punishment" under the Double Jeopardy Clause. After all, "[t]he first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia." Patton v. United States, 281 U.S. 276, 298 (1930). And consistent with that principle, the Court has traditionally given the same construction to terms that appear in different places in the Constitution. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (construing reference to "the people" in the Fourth Amendment consistently with the First, Second, Ninth, and Tenth Amendments and the Preamble); Patton v. United States, 281 U.S. at 298 (right to jury trial contained in Sixth Amendment construed consistently with right to jury trial under Article III, Section 2); Hepburn & Dundas v. Ellzev, 6 U.S. (2 Cranch) 445, 453 (1805) (Marshall, C.J.) ("When the same term ["state"] which has been used plainly in this limited sense, in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it"). The government offers no reason to abandon that interpretive practice in this case. Nor does the government explain why a forfeiture may be sufficiently punitive to

See United States v. Fogel, 829 F.2d 77, 88 (D.C. Cir. 19877) (Bork, J.) (the Double Jeopardy Clause "applies to 'multiple punisishments' because, if it did not apply to punishment, then the prohibition against 'multiple trials' would be meaningless; a court could achieve t the same result as a second trial by simply resentencing a defendant after he has served all or part of an initial sentence").

⁷ Compare Collins v. Youngblood, 497 U.S. 37, 48-49 (1990);); Thomas v. Washington Gas Light Co., 448 U.S. 261, 273 (1980) ((plurality opinion); Monell v. Department of Social Services, 436 U.S. 6:658, 695-696 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 I U.S. 36, 47 (1977); United States v. Darby, 312 U.S. 100, 116-117 (19941).

⁸ Compare Payne v. Tennessee, 501 U.S. at 827; California v. Acevedo, 500 U.S. 565, 576 (1991); Collins v. Youngblood, 497 U.S. at 50; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. at 47.

constitute an excessive fine and yet not punitive enough to trigger double jeopardy protections.9

Finally, the government frets (Br. 41) that "[t]he extension of Austin's reasoning * * * to the double jeopardy setting would have significant practical consequences." In particular, it says (ibid. (emphasis in the original)), Austin might "completely bar a later criminal prosecution of the property owner, even if the particular prior civil forfeiture were fairly characterized as substantively remedial." Moreover, the government warns (ibid.), "if Austin's formulation were extended to other contexts, it could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper, * * * would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable."

This parade of horribles is actually a parade of red herrings. In the first place, the government has the option of bringing both the forfeiture and the prosecution in the same proceeding. Under 21 U.S.C. 853(a)(2), any person convicted of a narcotics felony under Title 21 is required to forfeit any "property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" that felony. The government routinely includes such forfeiture counts in its criminal indictments. See, e.g., United States v. Bieri, 21 F.3d 819, 821 (8th Cir. 1994), cert. denied, 115 S. Ct. 208 (1994); United States v. Ben-Hur, 20 F.3d 313, 316 (7th Cir. 1994); United States v. Roth, 912 F.2d 1131,

1132 (9th Cir. 1990). And as the government itself points out (Br. 54), there is no double jeopardy bar to multiple punishments that are sought in a single proceeding. See, e.g., Missouri v. Hunter, 459 U.S. 359, 368-369 (1983). 10

Moreover, the government's fear (Br. 41) that Austin might be generalized to "all civil forfeitures," or even "other contexts," is overwrought. Austin took pains to rely (113 S. Ct. at 2810-2812) on the specially punitive features of Section 881(a)(7). Those features include, most pertinently, the fact that Section 881(a)(7) forfeitures bear "'absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" (id. at 2812). Forfeiture statutes correlating more closely with public harm are easily distinguishable on that ground. And sanctions like the "suspension of [a] motorist's license" (Gov't Br. 41) bear no relationship to Section 881(a)(7) at all. In fact, although amici State of Connecticut et al. complain about double jeopardy claims arising from suspended licenses (Br. 11), amici Advocates for Highway and Auto Safety et al. report (Br. 12-13) that such claims have been "unanimously rejected" by every one of the 14 state courts of last resort to have considered the issue - precisely because, sensibly enough, such proceedings do not contain the punitive features of Section 881(a)(7).

The government notes (Br. 41 n.10) that "this Court's characterization of forfeiture as either punitive or remedial has depended upon the specific legal context in which that question arose." But the cases cited by the government stand only for the undeniable proposition that some forfeitures are punitive, while others are not. None of the cases stands for the quite different proposition that a particular type of forfeiture may be punitive for purposes of one constitutional provision but not another.

The government protests (Br. 56 n.17) that "the vast majority of civil forfeiture statutes have no criminal forfeiture analogue." But the government does not explain why any of those statutes would be regarded as sufficiently "punitive" to raise double jeopardy concerns. Nor is it apparent why civil forfeitures lacking a "criminal forfeiture analogue" could not be joined in a single proceeding with a criminal case. Although the government asserts that this "cannot" be done "under our system of justice" (Br. 55), it does not explain why that is so. In fact, we know of no law that prohibits the government from initiating a single, continuous proceeding in which, for example, a jury first considers the criminal charges and the trial court immediately thereafter entertains a civil forfeiture proceeding.

4. In sum, the holding in Austin — that forfeitures of instrumentalities under 21 U.S.C. 881(a)(7) invariably constitute punishment, at least in part — clearly extends to the double jeopardy context. But even if the Court were prepared to jettison (or severely cabin) the rule in Austin, and instead apply what the government terms "the appropriate case-by-case inquiry" purportedly mandated by Halper, the result would be the same: the forfeiture of respondent's property was "punishment" for purposes of double jeopardy protections.

Under Halper, when a civil sanction "appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." 490 U.S. at 449-450. As Justice O'Connor explained in her dissenting opinion in Kurth Ranch, 114 S. Ct. at 1954, "the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case." If that framework is applied to the present case, it would fall first to respondent to show that the forfeiture of his property under Section 881(a)(7) "appears to qualify as 'punishment'" (490 U.S. at 449), and thereafter to the government "to justify the sanction with reference to the particular case" (114 S. Ct. at 1954).

If Austin is no longer to mean that Section 881(a)(7) forfeitures are always punitive (at least in part), surely Austin (unless overruled entirely) would require a presumption that Section 881(a)(7) forfeitures are partly punitive. Such a presumption makes perfect sense: Section 881(a)(7) — a statute of "immense scope" (United States v. James Daniel Good Real Property, 114 S. Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part)) — authorizes the forfeiture of "[a]|| real property, including any right,

title, and interest * * * which is used * * * in any manner or part" to facilitate a narcotics felony. Under that statute "all" property may be forfeited, even if only a "part" was used to facilitate the offense. The value of the forfeited property is likewise irrelevant: "[A]ny property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." Id. at 515 n.1. "Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal" (Austin, 113 S. Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment)). And actual facilitation is not even required; merely an "intent" to facilitate is enough to forfeit property that was never actually deployed in the commission of a crime.

What is more, the statute makes no attempt to calibrate the extent of the forfeiture to the actual costs imposed by the offense. To the contrary, as the Austin Court explained, "the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut" any contention that the forfeited assets merely "serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade." 113 S. Ct. at 2811. Section 881(a)(7) simply makes no "consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited." Id. at 2814 (Scalia, J., concurring in part and concurring in the judgment).

It follows that a forfeiture under Section 881(a)(7) certainly "appears to qualify as 'punishment' in the plain

Or, to take a more notorious example, "'[i]f Hugh Grant had been driving a Lamborghini would he have had to forfeit a \$140,000 car?

* * * That would seem pretty arbitrary.' "Give and Take on the Hot Issue of Asset Forfeiture, Wash, Post, March 11, 1996, Wash. Bus., at 7.

meaning of the word." Halper, 490 U.S. at 449 (emphasis added). Accordingly, "the burden [now] shifts to the government to justify the sanction with reference to the particular case." Kurth Ranch, 114 S. Ct. at 1954 (O'Connor, J., dissenting). But the government has not undertaken, much less carried, that burden here. It offered no evidence in the lower courts to establish the costs associated with respondent's offense. And its effort to do so in this Court, after the fact, is unavailing.

The government contends (Br. 46), for example, that "[b]ecause respondent used the property for several years to process and distribute a controlled substance, it significantly furthered the harms occasioned by drug trafficking." But the government greatly overstates the case. First and foremost, respondent "used" very little of "the property" to manufacture marijuana. As the evidence ultimately revealed (Pet. App. 2a) — and as the government now concedes (Br. 3) — all of the marijuana plants were grown completely outside the confines of respondent's property. And respondent used very little of his house to process the plants, performing most of the work in a crawl space beneath the floor in the master bedroom closet. Tr. 147. Yet the government secured a

forfeiture worth nearly half the equity in respondent's 10-acre property. Tr. 246.13

Moreover, the government's reference to "distribution" is unwarranted on this record. The forfeiture proceeding was resolved on consent, and thus the only evidence in the record of respondent's "drug trafficking" activity consists of the affidavit submitted in support of the seizure warrant. See J.A. 73-80. The affidavit recited that respondent had grown six plots of marijuana plants, had harvested them, and - in view of the evidence seized from within his residence - had evidently processed them. J.A. 76-79. But there was not even an allegation of distribution, much less evidence to support it. To the contrary, the affidavit suggested nothing more than what the criminal trial ultimately proved: that respondent was growing some marijuana plants for his family's own consumption. See, e.g., J.A. 79 ("a partially burnt hand rolled cigarette" was seized by the police from "the upper left desk drawer in bedroom No. 1" and it later proved to be marijuana).14

It therefore cannot be said on this record that respondent's manufacture of marijuana entailed the kinds of costs typically associated with "several years" of "distribut[ing] a controlled

In the district court, the government argued that respondent/ had waived his double jeopardy rights, that a double jeopardy claim could not be predicated on a consent judgment, that Austin should not be extended beyond the Eighth Amendment setting, and that the forfeiture and prosecution in this case were actually part of a single proceeding. See Government's Response To Defendant's Motion For Dismissal (filed Aug. 25, 1993). It did not argue, much less prove, that its costs of prosecution were commensurate with the amount of the forfeiture. And although the government asserted in the court of appeals that the size of the forfeiture was proportionate to the government's costs, it did not — because, on the record, it could not — quantify those costs with even a "rough justice" * * approximation" (Halper, 490 U.S. at 449-450).

Thus, the government's analogy to a case in which "an entire apartment building was used to sell crack cocaine" (Br. 44 n.12) is inapt. Indeed, it is hard to square any such suggestion with the government's decision in this case to permit Mr. Ursery to keep his house and forfeit money instead.

Significantly, the undisputed evidence at trial confirmed that respondent's manufacture of marijuana was for personal use. Commenting on the evidence at the close of the case, the trial court remarked: "[O]ne of the interesting aspects of this case is the government has made no effort to suggest that [respondent] wasn't going to use this [marijuana] for his own purpose." Tr. 292. And the government itself made much the same point in summation: "Why did the defendant grow the marijuana? Because he used this marijuana." Tr. 303.

substance." Gov't Br. 46. Perhaps recognizing as much, the government places a thumb on the scale, allocating (Br. 45) to respondent the duty to "defray[] the government's costs of enforcement and the societal harms created by that activity." But it hardly accords even with "rough remedial justice" (Halper, 490 U.S. at 446) to "plac[e] full responsibility for the 'war on drugs' on the shoulders of every individual claimant" (United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir.), cert. denied, 506 U.S. 815 (1992)). The question is one of degree, and the government has not shown (nor could it) that the amount of the forfeiture in this case was tailored to remediation only. In short, even accounting for "[a] reasonable allocation of more generalized enforcement costs - in the nature of overhead" (ibid.), the government has failed to overcome the presumption that the Section 881(a)(7) forfeiture in this case was, at least partly, punitive.

5. The court of appeals' decision rests exclusively on the multiple punishments component of the Double Jeopardy Clause. See Pet. App. 5a. But the forfeiture and prosecution in this case also violated the double jeopardy protection against multiple prosecutions. As the government acknowledges (Br. 20), "a pervasively penal civil statute" may trigger the protection against multiple prosecutions. This Court's decision in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), frames the appropriate analysis. In that case, the Court invalidated a statute that prescribed, without a criminal trial, loss of citizenship for any person who, to evade military service, remained outside the United States in time of war. The Court concluded (id. at 164) that the statute was "essentially penal in character." In reaching that result, the Court looked to several factors (id. at 168-169 (footnotes omitted)):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

Significantly, although it did not formulate its analysis in precisely those terms, the Court in Austin applied the very same criteria when it concluded that a forfeiture under 21 U.S.C. 881(a)(7) is, indeed, "punishment." Thus, the Court explained in Austin (113 S. Ct. at 2810-2812) (i) that under Section 881(a)(7) otherwise lawful property is forfeited ("an affirmative disability or restraint" (372 U.S. at 168)); (ii) that forfeitures have "historically been regarded as a punishment" (ibid.); (iii) that Section 881(a)(7) contains an "innocent owner" exception (and thus "comes into play only on a finding of" a form of "scienter") (372 U.S. at 168); (iv) that Section 881(a)(7) forfeitures "promote the traditional aims of punishment — retribution and deterrence" (372 U.S. at 168); (v) that a Section 881(a)(7) forfeiture is "tie[d] directly to the commission of drug offenses" (and thus "the behavior to which it applies is already a crime" (372 U.S. at 168)); and (vi) that imposing a forfeiture under Section 881(a)(7) "'ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" (and thus, again in the words of Mendoza-Martinez, the sanction "appears excessive in relation to the alternative purpose assigned" (372 U.S. at 169)).

It bears mention, finally, that none of the forfeiture cases on which the government relies (Br. 21-24) requires a different conclusion, or even provides a heavy counterweight — since none of the forfeiture statutes in those cases was remotely like Section 881(a)(7). It is one thing to forfeit

property that a defendant has sought to smuggle into the United States in violation of customs laws (One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972)); in that event, the property as a whole is "forbidden merchandise" and its value is "a reasonable form of liquidated damages for violation of the inspection provisions" (id. at 237). It is also one thing to forfeit property that is itself harmful to the community (United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984)); in that event, the forfeiture might, for example, keep "potentially dangerous weapons out of the hands of unlicensed dealers" - which "is a goal plainly more remedial than punitive." But it is quite another thing to forfeit Section 881(a)(7) property - a forfeiture that was intended by Congress to be punitive (Austin, 113 S. Ct. at 2811); that bears "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" (id. at 2812); that takes property that is, in and of itself, perfectly lawful (id. at 2811); and that is "tie[d] * * * directly to the commission of drug offenses" (ibid.).

B. For Purposes Of The Double Jeopardy Clause, It Does Not Matter That Respondent Was Subject To Civil Forfeiture Before He Was Subject To Criminal Prosecution, Rather Than Vice Versa

The government offers an alternative way of getting around *Halper* and *Austin*. Even if respondent was punished by the forfeiture, it contends (Br. 26-36), the forfeiture does not trigger double jeopardy protections because "a 'punishment' imposed in a civil proceeding" is not "a 'jeopardy' that triggers a protection against a later criminal prosecution" (Br. 30). In the government's view (Br. 32), "a prior criminal prosecution * * * is a prerequisite to the invocation of the Double Jeopardy Clause." Accordingly, because Mr. Ursery suffered the forfeiture first and the prosecution second — rather than the other way around — the govern-

ment would deny him the protections of the Double Jeopardy Clause.

That makes no sense at all. By its terms, the Double Jeopardy Clause is violated only when a person is "twice put in jeopardy." If, as Halper and Kurth Ranch held, a civil sanction imposed after a criminal sanction can violate the Double Jeopardy Clause, that can only be because the civil proceeding constitutes a second — i.e., a "double" — jeopardy. Accordingly, as Justice Scalia noted in his dissent in Kurth Ranch, "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." 114 S. Ct. at 1958. To our knowledge, every circuit to have addressed this issue has reached the same conclusion. 15

¹⁵ See, e.g., United States v. Stoller, No. 95-2175 (1st Cir. Feb. 29, 1996) ("as long as a civil sanction constitutes punishment in the relevant sense, it does not matter if the 'multiple' punishment - presumably a criminal sentence - precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to convict the defendant"); United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991) ("the order of proceedings matters not to the analysis; the Halper principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding"), cert. denied, 506 U.S. 841 (1992); United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir.) ("the Halper principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment"), cert. denied, 498 U.S. 865 (1990); United States v. Morgan, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995); United States v. Williams, 56 F.3d 63 (4th Cir. 1995); United States v. Tilley, 18 F.3d 295, 298 n.5 (5th Cir.), cert. denied, 115 S. Ct. 573 (1994); United States v. Austin, 54 F.3d 394, 399 (7th Cir. 1995); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990). But cf. United States v. Newby, 11 F.3d 1143, 1145 (3d Cir. 1993) (suggesting, without deciding, that a case in which the civil penalty preceded the criminal penalty might be distinguishable from Halper).

It would therefore be surprising to discover in Halper or Kurth Ranch any trace of the government's theory - that there is a "double" jeopardy only when the prosecution comes first. And of course there is no such suggestion in either case. True, the Court stated in Halper (490 U.S. at 448-449) "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." But that was simply a reflection of the fact pattern in Halper; the Court certainly was not saying that double jeopardy protections apply only when the prosecution comes first. After all, if an initial civil proceeding cannot pose a single jeopardy, how can a subsequent civil action ever present a double jeopardy?

Nor is it true that "Halper turns on the notion that criminal convictions and their resulting sentences, at some point, achieve a degree of finality that is worthy of societal protection." Gov't Br. 31. Instead, the case "turns on" what the Court said it turns on (490 U.S. at 448): "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction serves the goals of punishment."

Kurth Ranch also provides cold comfort to the government's "order is everything" theory. 114 S. Ct. 1937. In that case, the Court invalidated, on double jeopardy grounds, a Montana tax on the possession of illegal drugs that followed upon a criminal penalty for drug offenses. As in Halper, the civil sanction happened to follow the criminal penalty; but nowhere did the Court place any weight on that fact. To the contrary, the Court focused on the features of the tax proceeding itself and concluded (id. at 1948) that the proceeding was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'" If anything, then, Kurth Ranch sets forth precisely the proposition the government

denies: that, when the government seeks and obtains a civil sanction, the defendant may be placed in "jeopardy" sufficient to trigger double jeopardy protections. 16

In short, the government is only half-right when it invokes (Br. 30) "the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy.'" The inevitable complementary proposition is that before the accused "can suffer double jeopardy," he must suffer a second jeopardy. Halper and Kurth Ranch stand for the proposition that, under appropriate if "rare" circumstances (490 U.S. at 449), a civil sanction may give rise to jeopardy. Whether it comes first or second cannot possibly make a constitutional difference. 17

¹⁶ Perhaps mindful of this complication, the government rewrites the Kurth Ranch decision, suggesting (Br. 34) (emphasis in the original) that the case "may be best understood" as involving "the Double Jeopardy Clause's prohibition on successive prosecutions," not the prohibition on multiple punishments. But the Court stated at the outset of the opinion what was at stake in Kurth Ranch (114 S. Ct. at 1941) (emphasis added; footnote omitted): "This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." Moreover, if the case was, in fact, a "multiple prosecutions" case, it is hard to see why Justice Scalia dissented in an opinion stating that the Double Jeopardy Clause "prohibits, not multiple punishments, but only multiple prosecutions." 114 S. Ct. at 1955. In any event, if the tax proceeding in Kurth Ranch was a second prosecution, so too was the criminal proceeding against Mr. Urserv.

This Court's decision in Witte v. United States, 115 S. Ct. 2199 (1995), does not alter the analysis. In that case, Witte's sentence for marijuana offenses was increased because of his participation in certain cocaine offenses. Thereafter, the government prosecuted Witte for the cocaine offenses as well. This Court held that the Double Jeopardy Clause did not prohibit the second prosecution because "a defendant * * * is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted." Id. at 2205. Because Witte had been

C. Respondent Was In Jeopardy Of Being Punished Twice For "The Same Offense"

In every legal and practical sense, Mr. Ursery was punished twice for "the same offense." Each proceeding charged the same crime - manufacturing marijuana. The evidence in each case was virtually identical; the witnesses were the same: the elements of the offenses dovetailed completely. The only difference was in the nature of the two punishments: in the first proceeding, respondent lost his property for manufacturing marijuana; in the second, he was sent to jail for manufacturing marijuana. It would be hard to explain, even to a lawyer, how these could possibly be "different" offenses. Particularly in "the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments" (Halper, 490 U.S. at 447), it is entirely "well suited" (ibid.) to conclude that respondent's forfeiture and conviction were for "the same offense."

As we show below, the same conclusion applies under Blockburger v. United States, 284 U.S. 299 (1932). Applying the Blockburger rule, the court of appeals held (Pet. App. 11a-13a) that the forfeiture of respondent's property and the criminal conviction against him were punishments "for the same offense." The court noted (id. at 12a) that 21 U.S.C. 881(a)(7) authorizes the government to forfeit all real property used "to commit or to facilitate... a violation of this subchapter.'" Such "violations" include manufacturing marijuana — the very crime for which Mr. Ursery was

convicted the first time around only of marijuana charges — and the sentence, while augmented, still fell within the guidelines for marijuana trafficking — the government was free to prosecute in a second case for the cocaine offenses. Nowhere in the case, however, did the Court suggest that only a criminal conviction can trigger double jeopardy protections. As we noted above, such a reading of Witte could not be squared with Halper or Kurth Ranch.

convicted. Accordingly, the court reasoned (Pet. App. 12a), "[t]he criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." In our view, that is exactly right.

 Under Blockburger, the criminal charge against respondent was "a species of lesser-included offense" in the forfeiture action, and may not be separately punished

Under Blockburger, "where the same act or transaction constitutes a violation of two distanct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. By its terms, Section 881(a)(7) requires the government to prove that the property it wishes to forfeit was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." 21 U.S.C. 881(a)(7) (emphasis added). The forfeiture provision thus expressly incorporates the felony provisions of Title 21 including 21 U.S.C. 841(a)(1), under which respondent was convicted. The forfeiture provision also requires proof of "a violation" (i.e., all the elements) of the incorporated felony. Proving the elements of the Title 21 felony would invariably prove all but one of the elements of the forfeiture, requiring the government to prove in addition only the "use of the property to facilitate" the felony. Not surprisingly, therefore, a criminal conviction on the underlying felony is routinely given collateral estoppel effect in subsequent forfeiture actions. See, e.g., United States v. "Monkey." 725 F.2d 1007, 1010 (5th Cir. 1984); United States v. Certain Real Property & Premises Known as 63-29 Trimble Road, Woodside, New York, 812 F. Supp. 335, 338 (E.D.N.Y. 1992); United States v. Premises & Real Property at 250 Kreag Road, 739 F. Supp. 120, 123 (W.D.N.Y.

1990); United States v. Parcel of Land & Buildings Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts, 721 F. Supp. 1, 3 (D. Mass. 1988), aff'd, 884 F.2d 41 (1st Cir. 1989). Compare Halper, 490 U.S. at 441 & n.4 (finding of "same offense" where defendant was found "liable strictly on the basis of the facts established in the criminal proceeding").

In light of this statutory structure, the underlying narcotics felony is "a species of lesser-included offense" (Illinois v. Vitale, 447 U.S. at 420) in the forfeiture provision. Of course, the forfeiture itself is not an "offense" at all; it is a punishment for an offense (Libretti v. United States, 116 S. Ct. 356, 362-363 (1995)). But the offense that it punishes using property to facilitate a narcotics felony — is a classic "greater offense," in that it incorporates, and predicates the penalty, on the same elements as the incorporated narcotics felony. And under this Court's cases, a defendant who has suffered the penalty for the greater offense (here, the use of property to commit a narcotics felony) cannot thereafter be punished for the lesser-included offense (here, the narcotics felony). For more than 100 years, it has been settled that "a person [who] has been tried and convicted for a crime which has various incidents included in it, * * * cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." In re Nielsen, 131 U.S. 176, 188 (1889). Thus, where a defendant was convicted of a felony-murder arising from a robbery with firearms, he could not thereafter be prosecuted for the lesser-included armed robbery. Harris v. Oklahoma, 433 U.S. 682 (1977). Conversely, where a defendant was convicted of the lesserincluded offense of joyriding, he could not thereafter be prosecuted for the greater offense of auto theft. Brown v. Ohio, 432 U.S. 161 (1977).

The government's contrary argument (Br. 50-53) is based on a misunderstanding both of the relevant statutes and of this Court's double jeopardy cases. In the government's view (Br. 51-52), "[c]onviction on the criminal charges" in these consolidated cases "required proof that respondents participated in a conspiracy, possessed a controlled substance with the intent to distribute it, or engaged in unlawful money laundering transactions." But first, the government overlooks the fact that respondent *Ursery's* conviction rested on none of these charges; he was convicted of manufacturing marijuana, the very crime underlying the forfeiture. In both proceedings, the underlying "offense" was identical: manufacturing marijuana.

More fundamentally, the government misconstrues this Court's precedents when it contends (Br. 52) that, in "contrast" to the criminal provisions, "the forfeiture statutes do not require proof of any particular crime, or proof of the participation of the property owner in the offenses that supported the forfeiture, much less proof that the owner entertained a mental state required for a criminal conviction." Although Section 881(a)(7) does not invariably require such showings, in the circumstances of this particular case the forfeiture did require the government to prove the same elements as the criminal charge. And this Court's cases confirm that it is at this "retail" level that the Block-burger analysis must proceed.

For example, in Whalen v. United States, 445 U.S. 684 (1980), the Court held that, under Blockburger, a defendant could not be separately punished for rape and for a felony murder based on killing the same victim in the perpetration of the rape. The government argued — as it does here — that the greater offense (there, felony murder) "does not in all cases require proof" of the lesser offense (there, rape); for example, the government noted, the predicate offense could just as easily have been robbery, kidnapping, or arson. Id. at 694. The Court rejected that argument. "In the present case," the Court explained, "proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from

other cases in which one criminal offense requires proof of every element of another offense." Ibid. (emphasis added).

The Court applied the same principle in Illinois v. Vitale. 447 U.S. 410 (1980). The question in Vitale was whether. under the Double Jeopardy Clause, a defendant's conviction for failing to reduce speed to avoid a collision precluded the State from prosecuting him for involuntary manslaughter arising from an automobile accident. The Court analyzed the question by focusing on the State's actual trial theory - not what elements the State theoretically could prove at a manslaughter trial, but what elements it actually would prove at this defendant's trial. As the Court put it (447 U.S. at 420), "it may be that to sustain its manslaughter case [against defendant] the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure. * * * In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown [v. Ohio, 432 U.S. 161] and our later decision in Harris v. Oklahoma. 433 U.S. 682 (1977)." In remanding the case for further proceedings, the Court added (447 U.S. at 421): "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution."

Here, as in *Harris*, *Whalen*, and *Vitale*, the charge of manufacturing marijuana is "a species of lesser-included offense" (*Vitale*, 447 U.S. at 420) within the greater offense charged in 21 U.S.C. 881(a)(7).¹⁸ To "sustain" (*Vitale*,

447 U.S. at 420) its forfeiture in this case, the government proved, by consent judgment, that respondent had manufactured marijuana — one of the predicate offenses explicitly incorporated in 21 U.S.C. 881(a)(7). Having "relie[d] on and prove[d]" that predicate in the first proceeding, the government may not separately punish respondent for the same offense in a subsequent proceeding. Accord 9844 South Titan Court, 75 F.3d at 1489-1491. Cf. also United States v. Tilley, 18 F.3d 295, 297-298 (5th Cir.) ("if the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial") (footnote omitted), cert. denied, 115 S. Ct. 573 (1994).

Surely there would be no doubt about that result if the first proceeding had been a criminal forfeiture under 21 U.S.C. 853(a)(2), rather than a civil forfeiture under 21 U.S.C. 881(a)(7). Presumably even the government would concede that it could not prosecute respondent for the underlying narcotics felony after first proceeding against him in a criminal forfeiture action. But under Halper and Austin, the Section 881(a)(7) civil forfeiture must be regarded as the functional equivalent of a Section 853(a)(2) criminal forfeiture. And if the Double Jeopardy Clause forbids the government from bringing a prosecution for the underlying offense after a criminal forfeiture, it likewise prohibits prosecuting respondent after first forfeiting his property under Section 881(a)(7).

See also *United States* v. *Dixon*, 113 S. Ct. 2849, 2856-2858 (1993) (Scalia, J., joined by Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecut-

ed for violating the drug offense on which the contempt sanction had been based); Payne v. Virginia, 468 U.S. 1062 (1984) (conviction for robbery was barred under Double Jeopardy Clause where it followed conviction for capital murder committed during the perpetration of an armed robbery).

The two proceedings cannot be carved up and separately prosecuted based on different "theories" or different time frames

The government contends (Br. 53 n.15 (emphasis in the original)) that the two offenses at issue here are not "the same in fact." According to the government (ibid.), in the criminal case "[r]espondent Ursery was not charged with, or convicted of, manufacturing marijuana based on any theory that he grew the plants on his property, or that he did so more than once, but rather on the basis that he did so in property belonging to one of his neighbors and on a specific date — July 30, 1992." By contrast, the government insists (id. at 54 n.15), "the civil forfeiture action * * * was based on respondent's use of his own property to facilitate the processing and distribution of marijuana over the period of 'several years' that concluded with the search of his residence."

That is neither factually true nor legally relevant. Both proceedings in this case - the forfeiture first, and the prosecution second - were based on exactly the same "theory" (Gov't Br. 53 n.15) and exactly the same evidence. Mr. Ursery most assuredly was convicted of manufacturing marijuana "on his property" (ibid.). Indeed, the government devoted much of the trial to displaying the physical evidence seized from respondent's home (Tr. 32, 36, 38, 40, 42-46, 126, 148, 281). It also proved the presence of marijuana in respondent's backyard (Tr. 138), respondent's use of marijuana on his premises (Tr. 149), and even his processing of marijuana plants in the freezer and microwave oven (Tr. 145). That was the very same "theory" on which the forfeiture was based; there, too, the government alleged that respondent had used his residence to manufacture marijuana. See J.A. 73-79.

Conversely, the forfeiture action — like the criminal prosecution — was also based on the "theory" that respon-

dent had used neighboring property to grow marijuana. According to the seizure warrant, an informant (Ms. McPherson) had advised police officers that respondent "grows marijuana on his property every year by first starting seedlings indoors, and then transporting them outside to let the plants grow to maturity." J.A. 76. The evidence ultimately revealed (see, e.g., Pet. App. 2a; Tr. 11) that the "property" on which respondent was growing marijuana was between 25 and 150 feet outside his property line. In short, the "theory" in both proceedings — both the forfeiture and the prosecution — was that respondent had grown marijuana off his premises and processed it on the premises.

More critically, the government's "different theory" distinction is legally beside the point. A single, discrete offense cannot be carved up into separately prosecutable legal "theories." This Court's decision in Sanabria v. United States, 437 U.S. 54 (1978), makes precisely that point. There, the trial court had entered a mid-trial judgment of acquittal on the ground that there was insufficient proof that the defendant had participated in a gambling business. The government acknowledged that it could not retry the defendant on the particular theory that the trial court had found wanting - specifically, that defendant had participated in a horse-betting scheme. The government insisted, however, that it could proceed on a different theory - that the defendant had participated in numbers betting. This Court rejected that contention. There was only one offense charged, the Court held (id. at 71-72): participation in gambling. And that single charge could not be carved up, and retried, based on a new theory. As the Court put it (id. at 72): "'The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units,' Brown v. Ohio, 432 U.S., at 169, or as we hold today, into 'discrete bases of liability' not defined as such by the legislature."

There is likewise no substance to the government's contention (Br. 53 n.15) that the prosecution focused "on a specific date - July 30, 1992," while the forfeiture was based on marijuana manufacturing "over the period of 'several years.'" Although the indictment charged respondent with manufacturing "on or about July 30, 1992," the government offered abundant evidence of conduct from earlier years. See, e.g., Tr. 138, 179. And as a matter of law, the government was not required to prove an offense "on a specific date"; it only had to prove the offense "on or about" that date, and the jury was accordingly instructed to determine whether "the offense was committed on dates reasonably near the dates set forth in the Indictment." Tr. 354. See, e.g., United States v. Harrison-Philpot, 978 F.2d 1520, 1526 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993). Moreover, the forfeiture action focused on a continuous course of conduct, and "[e]very minute" that respondent manufactured marijuana "he was simultaneously committing both the lesser included [felony] and the greater" offense (the use of property to commit a narcotics felony). Garrett v. United States, 471 U.S. 773, 789 (1985). In any event, it does not matter, for double jeopardy purposes, that the forfeiture action involved a course of conduct over "several years," while the criminal prosecution involved only a single date, plucked from within that period. To restate what the Court said in Brown and Sanabria: "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

D. Respondent Was In Jeopardy Of Being Punished Twice In "Separate Proceedings"

We agree with the government (Br. 54-59) that the Double Jeopardy Clause does not prohibit statutorily authorized multiple punishments that are imposed in the "same proceeding." See *Kurth Ranch*, 114 S. Ct. at 1945; *Halper*, 490 U.S. at 450. The court of appeals was correct, however, in

concluding (Pet. App. 13a-17a) that the forfeiture and prosecution in this case were separate proceedings.

As a general rule, two proceedings are "separate" for purposes of double jeopardy when they bear the formal characteristics of separateness: different trials, different timing, different docket numbers, and different judges. These are the defining features of a "proceeding" in our legal system. Under that framework, respondent's forfeiture and prosecution were clearly separate.

If formalities are not enough, however, separateness should be analyzed in terms of the underlying purpose of the Double Jeopardy Clause — to protect defendants from the harassment of multiple actions. For several reasons, that purpose is best served by treating the two actions in this case as separate proceedings.

1. A "proceeding" in our legal system has certain defining characteristics, tied principally to a particular tribunal. Black's Law Dictionary, for example, defines a "proceeding" as "the form and manner of conducting juridical business before a court or judicial officer." Black's Law Dictionary 1083 (5th ed. 1979) (emphasis added). Similarly, "legal proceedings" are defined as "all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy." Id. at 807 (emphasis added). Proceedings have a "[r]egular and orderly progress" (id. at 1083), flowing from the initiation of the lawsuit, the assignment of a particular docket number and judge, the setting of a trial date, through and including the prospect of post-trial litigation.

In our view, the meaning of "separate proceedings" should hinge, first and last, on these formal criteria. That approach best accords with how "proceeding" is understood in common legal parlance. It also accords best with this Court's cases. Indeed, this Court has invariably defined

"same proceeding" in such plain, common-sense terms. Thus, for example, in *Kurth Ranch* the Court used the terms "separate legal proceedings" (114 S. Ct. at 1942) to differentiate a series of actions that had overlapping starting dates but different venues and purposes: prosecution, forfeiture, and dangerous drug tax collection actions. Elsewhere, the Court has defined a single proceeding as one in which "no more than one trial *** was ever contemplated" (*Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984)) or as one in which the "trial [is] completed by a particular tribunal" (*United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980) (internal quotation marks omitted)). And in *Halper* the Court equated a "single proceeding" with a "'single trial." 490 U.S. at 450-451 (quoting *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983)).

This formal, common-sense definition of "separate proceeding" also has the virtue of certainty and predictability. Unlike the government's test — which turns on such vagaries as "the defendant's legitimate expectation of finality" (Br. 57) and a prosecutor's "inten[t] to seek a full complement of statutorily authorized remedies" (Br. 57) — our approach does not require courts to assess the "expectations" or "intentions" of the parties. Instead, a court need only ask whether the two actions at issue bear all the usual hallmarks of "separateness," as that concept is conventionally understood in our legal system.

Applying these criteria, the two actions against Mr. Ursery were unmistakably separate. Two distinct tribunals considered the punishment imposed on Mr. Ursery, at two separate times, and (had the forfeiture case not settled) would incontestably have done so at two separate trials. Moreover, as the court of appeals noted (Pet. App. 16a), the actions "were instituted four months apart, presided over by different judges and resolved by separate judgments." Proceedings that involve different adjudications before different tribunals at different times — and that have been pursued despite

absolutely "no communication between the government attorneys" handling each proceeding (see *ibid*.) — can no more be artificially aggregated in order to pass muster under the Double Jeopardy Clause than "infinitely subdivided" in order to support a defendant's claim. *Ohio* v. *Johnson*, 467 U.S. at 501.

The government has a different idea. It would replace these common-sense formalities with a rule that allows several "parallel" proceedings so long as they are "basically contemporaneous" (Br. 57) - a concept that apparently is pliable enough to embrace a delay of four months. That notion cannot stand before precedent or common sense. The "separate legal proceedings" that this Court identified in Kurth Ranch (114 S. Ct. at 1942) also were "basically contemporaneous"19 - indeed, more nearly simultaneous than the criminal prosecution and the forfeiture that the government pursued against Mr. Ursery - but that did not make them less "separate." See United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994) ("In Kurth Ranch itself the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered"). Likewise, the temporal overlap between the proceedings in this case did not make two into one. Accord 9844 South Titan Court, 75

⁽see Pet. Br. 4 (No. 93-144)), and judgment was entered pursuant to a plea agreement on July 18, 1988 (see 114 S. Ct. at 1942). The civil forfeiture claim was filed on December 3, 1987, and judgment was entered on October 28, 1988. See In re Kurth Ranch, 122 B.R. 759, 760 (Bankr. D. Mont. 1991). The dangerous drug tax (which was adjudicated as part of a bankruptcy proceeding) was assessed on December 12, 1987. See In re Kurth Ranch, 145 B.R. 61, 63 (Bankr. D. Mont. 1990).

F.3d at 1488 ("'two trials, even if close in time, are still double jeopardy'"); *Torres*, 28 F.3d at 1465 (same).²⁰

In short, the forfeiture and prosecution against Mr. Ursery were plainly separate in every conventional sense. This Court need go no further in rejecting the government's contrary claim.

2. If formalities are not sufficient, however, the meaning of "separate proceedings" should be grounded in the purposes of double jeopardy protection. At bottom, the Double Jeopardy Clause "guards against Government oppression" (United States v. Scott, 437 U.S. 82, 99 (1978)) through an "intrinsically personal" protection (Halper, 490 U.S. at 447). The Clause protects against the strain, expense, and harassment of multiple proceedings that purport to punish a defendant for the same offense. See, e.g., Abney v. United States, 431 U.S. 651, 661 (1977) (Double Jeopardy Clause guarantees individuals that they will not be "forced * * * to endure the personal strain, public embarrassment, and expense" of multiple proceedings); United States v. Scott, 437 U.S. 82, 87 (1978) (protection also against "ordeal" and "continuing state of anxiety and insecurity") (quoting Green

v. United States, 355 U.S. 184, 187-188 (1957)); see also United States v. Dinitz, 424 U.S. 600, 608 (1976) (protection against "delay"). The core principle is that a defendant should not be forced to "'run the gauntlet' a second time" to answer for the same offense, Abney, 431 U.S. at 662, and should not have to gather and deploy the resources and energies necessary for his defense more than once for each crime with which he is accused.

Under that view of the purposes of the Double Jeopardy Clause, the proceedings in this case were undeniably "separate." First, the two actions were instituted four months apart; and successive filings are themselves harassing, even if the cases ultimately overlap in part. "The practice of instituting multiple proceedings against a single defendant, which the government benignly terms a 'coordinated lawenforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him." 9844 South Titan Court, 75 F.3d at 1488 (emphasis added).

Second, the government gained a palpable tactical advantage from the separation. The criminal prosecution against Mr. Ursery was not initiated until the parties in the forfeiture case had conducted discovery and even exchanged witness lists for trial. By that point, the government had obtained invaluable insights into the defense case, enabling it "to hone its presentation of its [own] case" in the subsequent prosecution. Ohio v. Johnson, 467 U.S. at 501. And significantly, discovery of the defendant's witnesses, and consequent trial strategy, is a right the government did not have in the prosecution itself. Compare Fed. R. Civ. P. 26(a)(3) (requiring disclosure of all witnesses expected to testify at trial) with Fed. R. Crim. P. 16(b)(1)(c) (requiring disclosure only of defendant's expert witnesses, and only if the defendant has requested and received similar disclosure from the government). By timing the prosecution as it did, the government effectively circumvented the restrictions on

The government attempts (Br. 58-59) to counteract the intuitively obvious separateness of the proceedings at issue by chastising Mr. Ursery for failing to move for dismissal on double jeopardy grounds until he had been convicted. It is not clear what difference this fact makes for purposes of whether the two actions were "separate proceedings." The government's position is particularly surprising in light of its previous, repeated contentions in the lower federal courts that a "multiple punishments" challenge may be brought *only* after the second punishment has been imposed. The government has advanced that theory in urging courts of appeals — usually without success — to dismiss interlocutory appeals from double jeopardy rulings that were entered before the second punishment was imposed. See, e.g., United States v. Perez, 70 F.3d 345, 346-347 (5th Cir. 1995) (rejecting argument); United States v. Baird, 63 F.3d 1213, 1215 n.4 (3d Cir. 1995) (same); United States v. Chick, 61 F.3d 682, 684-685 (9th Cir. 1995) (same).

federal criminal discovery rules, "gain[ing] an advantage from what it learn[ed] * * * about the strengths of the defense case and the weaknesses of its own." DiFrancesco, 449 U.S. at 128.

Finally, unlike the cases cited by the Solicitor General (Br. 56 n.16), it cannot be said that "respondent's efforts were directed to separate disposition" of the two actions. Ohio v. Johnson, 467 U.S. at 502. Unlike the defendants in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), and Jeffers v. United States, 432 U.S. 137 (1977), Mr. Ursery was not "responsible for insisting that there be separate rather than consolidated trials." Ohio v. Johnson, 467 U.S. at 502. To the contrary, it was entirely the government's choice to bring criminal charges against Mr. Ursery four months after commencing the forfeiture proceeding. Far from attempting, as it did in Jeffers, to join all proceedings in a single trial, the government - which alone controlled the initiation of the proceedings - imposed multiple proceedings, and multiple punishments, upon Mr. Ursery.

3. The government's contrary view rests on a crabbed understanding of the purposes of double jeopardy protection. The Double Jeopardy Clause is not designed to safeguard merely "the defendant's legitimate expectation of finality" (Br. 57); it also protects against the "prevention of prosecutorial overreaching" (Ohio v. Johnson, 467 U.S. at 501). The government cannot defend "piling on" additional proceedings merely by claiming that the outcome of the first proceeding has not yet been determined.

Indeed, if the government's argument were correct, there would hardly be much to double jeopardy at all: the government could defeat any such "legitimate expectation" simply by announcing, before the close of the first proceeding, that it intended to launch a new action. It would not matter that the defendant had litigated the first proceeding through

discovery; it would not matter that the parties were poised to begin trial in the first proceeding. And it would not even matter that both proceedings were criminal prosecutions charging identical offenses. So long as the government can still assert "here we go again," all would be the "same" proceeding, and any double jeopardy claim would swiftly go by the boards. Yet that is precisely the sort of "governmental overreaching that double jeopardy is supposed to prevent." Ohio v. Johnson, 467 U.S. at 502.

Nor should it matter that the government may not, in fact, have been "dissatisfied" with the results in the forfeiture case at the time it commenced the criminal action. Gov't Br. 58. In the first place, it is by no means clear why the Court should credit that factual assertion; there is no basis in the record for gauging the government's state of mind at the time of the indictment. Indeed, for all we know, the government — having litigated the forfeiture to the brink of trial — was dissatisfied with the likely outcome and indicted the case to up the ante. In any event, "the government's good faith does not make two proceedings a single jeopardy." 9844 South Titan Court, 75 F.3d at 1488.²¹

Finally, there is no merit to the government's suggestion (Br. 56 n.17) that the two actions in this case must be a single proceeding because "Congress quite clearly intended" the two punishments "to be available." For one thing, the issue is a strawman at best: there is in fact no impediment to bringing the type of forfeiture at issue in this case in a consolidated criminal proceeding. And other forfeiture provisions — which the government claims it cannot consolidate with criminal actions (but see page 22 n.10 (supra)) —

Moreover, even if, as the district court concluded (Pet. App. 39a), the two proceedings in this case were "coordinated," that cannot alleviate double jeopardy concerns. To the contrary, coordinating the proceedings is likely to exacerbate the harassment entailed by exposing a defendant to multiple punishments. See 9844 South Titan Court, 75 F.3d at 1488.

may not be sufficiently punitive to trigger double jeopardy protections in the first place.

In any event, the Double Jeopardy Clause, like other provisions of the Bill of Rights, is a limitation on the means by which congressional intent may be carried out. As the Court has observed, "where the Double Jeopardy Clause is applicable, its sweep is absolute * * *, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Burks v. United States. 437 U.S. 1, 11 n.6 (1978). More than some other provisions, the Double Jeopardy Clause "require[s] the Government to turn square corners." Jones v. Thomas, 491 U.S. 376, 396 (1989) (Scalia, J., dissenting). It would seem simple enough to bring a criminal case and a civil case before the same judge and jury as part of the same proceeding, much as in many states a criminal trial in a capital offense is followed by a sentencing "trial" before the same jury. Yet if, as the Solicitor General contends (Br. 56 n.17), the Double Jeopardy Clause may, "[a]s a practical matter," make it impossible to punish a defendant with both a criminal sentence and a civil forfeiture, any needed procedural adjustment is a matter well within the power and the competence of Congress. Unless and until Congress acts, the Double Jeopardy Clause does not permit the government to pretend that two proceedings are really only one.

CONCLUSION

The judgment of the court of appeals should be affirmed. Respectfully submitted.

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Supreme Court, U.S. F I L E D

APR 10 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

United States of America, petitioner

ν.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

ν.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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Respondents and their amici approach the issues raised by these cases as if the Double Jeopardy Clause never existed before *United States* v. *Halper*, 490 U.S. 435 (1989). They construe that decision as having overruled, without comment, a unanimous decision rendered barely five years earlier finding the Double Jeopardy Clause "not applicable" to a civil forfeiture sanction, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984), and as having entirely displaced

the traditional imposition of criminal punishment and civil in rem forfeiture based on the same events, which this Court unanimously sustained against a double jeopardy attack in Various Items of Personal Property V. United States, 282 U.S. 577, 581 (1931). In respondents' view, either Congress must create novel hybrid proceedings in which civil and criminal cases are tried together under a single caption or prosecutors must use criminal forfeiture (which, unlike civil forfeiture, was entirely unknown in this country before 1970, see 1 C. Wright, Federal Practice & Procedure § 125.1, at 389 (2d ed. 1982)) whenever they seek to forfeit the property of a potential criminal defendant. Such a radical revision of how our justice system has operated since 1791 would require the most compelling justifications. Respondents' proposal instead arrives unsupported by doctrine or history, and should accordingly be rejected.

1. Respondent Ursery does not address this Court's recognition that, as used in the Fifth Amendment, the term "jeopardy" refers to a specific danger: the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. See, e.g., Breed v. Jones, 421 U.S. 519, 528 (1975). Nor does he expressly take issue with our submission that this Court's understanding of "jeopardy" rests on the unique role and consequences of criminal sanctions and on the Double Jeopardy Clause's historical origins in common-law pleas peculiar to the criminal process. He assumes instead that Halper overruled those cases and rejected that traditional understanding, because, in his view, Halper's conclusion that a civil action can violate the Clause necessarily rests on the conclusion that "the civil proceeding constitutes a second—i.e., a 'double' jeopardy." Ursery Br. 31; see also id. at 10; ACLU Br. 20 (noting that, after Halper, jeopardy "refers to [the] risk of any punitive governmental action").

That contention is incorrect, because it disregards the fact that Halper did not create the "multiple punish-

ments" doctrine. As we have explained (U.S. Br. 26-31), that doctrine already had a settled meaning when the Court invoked it in Halper. As applied to successive punishments, the doctrine was, and remains, a rule of finality for the "jeopardy" experienced as a result of a criminal conviction. Cf. ACLU Br. 20 n.11 (conceding that a "central purpose" of the Clause is to protect "the finality of jury verdicts"). While Ursery argues that the logic of Halper requires recognition of a new concept of "civil" jeopardy, see Ursery Br. 32, he overlooks that multiple-punishments analysis has never entailed a showing of two "jeopardies." See U.S. Br. 27-28. Rather, that analysis stems from Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874), which involved only one criminal prosecution, and had been applied before Halper only to support two legal rules: (1) that a court, in a single proceeding, may not impose more punishment than the legislature intended, and (2) that following service of a criminal sentence, a court may not upset legitimate expectations of finality by imposing a new sentence. Neither of those applications required a second "jeopardy"; and the same is true of Halper, which extended multiplepunishments analysis to cover a punitive civil sanction imposed after a criminal conviction.1

Respondent fares no better with his analysis of Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct.

¹ While Ursery faults our reading of Halper as lacking support on anything that "the Court said" in that case, his own interpretation is able to explain Halper's repeated and explicit emphasis on the defendant's prior conviction only by dismissing it as "simply a reflection of the fact pattern in Halper." Ursery Br. 32. But the Halper Court made clear that the prior conviction had operative legal significance in that case by expressly stating that the "only proscription" established by the Court's ruling was against the imposition of a punitive civil judgment after the imposition of a "criminal penalty." Halper, 490 U.S. at 451; see id. at 448-449 (stating Court's holding). And Ursery makes no effort to respond to our doctrinal analysis, which shows how Halper developed from a prohibition against multiple punishments that applies only when there is a prior criminal conviction.

1937 (1994). That case does not establish that "when the government seeks and obtains a civil sanction[] the defendant may be placed in 'jeopardy' sufficient to trigger double jeopardy protections." Ursery Br. 32-33. While Kurth Ranch began by asking whether the "tax" in that case "may violate the constitutional prohibition against successive punishments for the same offense," 114 S. Ct. at 1941, it concluded by holding that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence,' " id. at 1948 (emphasis added). As we have explained (U.S. Br. 34), in light of that language—and the Court's conclusion that the tax "must be imposed during the first prosecution or not at all," 114 S. Ct. at 1948 (emphasis added)-Kurth Ranch is best understood as finding the Montana tax to be so inherently punitive that the State could not impose it at all outside the context of a criminal prosecution. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). In any event, it is clear that in Kurth Ranch, as in Halper, the defendant had suffered a prior criminal judgment (i.e., a "jeopardy") to which a constitutional expectation of finality could attach. Ursery, in contrast, incurred no such judgment in the in rem forfeiture action.2

Witte v. United States, 115 S. Ct. 2199 (1995), reinforces the conclusion that a prior "jeopardy," understood as the risk of conviction for a criminal offense, remains an essential predicate for invoking the Double Jeopardy Clause. Witte rejected a double jeopardy claim precisely because the defendant had not faced a prior criminal prosecution for the offense for which he purportedly was punished. Ursery seeks to explain Witte by suggesting (Br. 33-34 & n.17) that Witte's first criminal sentence was authorized by the Guidelines, even if it also reflected a punitive enhancement for a different crime for which he was later separately prosecuted. That explanation does not distinguish this case, because everything the government did here was duly authorized by statute. Nor is it responsive to our basic point about Witte: that the Court's reasoning and judgment cannot be squared with respondent's view that the Court has abandoned the traditional understanding of "jeopardy." Indeed, while Ursery ultimately asserts that Witte cannot mean what the Court's opinion says, because "such a reading * * * could not be squared with Halper or Kurth Ranch," Ursery Br. 34 n.17, the more accurate conclusion is that Witte shows why Ursery's reading of Halper and Kurth Ranch is incorrect.

The anomalous consequences of Ursery's notion that civil sanctions can give rise to "jeopardy" are illustrated by his claim (Br. 35-39) that his crime is a lesser-included offense of in rem forfeiture under 21 U.S.C. 881(a)(7). The rules governing lesser-included offenses provide that a defendant may be convicted of any lesser offense that the jury finds proven when the jury does not convict on the greater offense. See Fed. R. Crim. P. 31(c); Schmuck v. United States, 489 U.S. 705, 717-718

² Ursery claims in passing (Br. 28-30) that 21 U.S.C. 881(a) (7) is inherently penal under this Court's analysis in Kennedy v. Mendoza-Martinez, supra, such that he may claim the Double Jeopardy Clause's protection against multiple prosecutions. That claim is foreclosed by 89 Firearms, supra, which rejected it with respect to an identically worded forfeiture statute. Contrary to Ursery's claim (Br. 30), 89 Firearms cannot be distinguished on the ground that the statute at issue in that case sought to remove from circulation "potentially dangerous" firearms. While firearms are indeed potentially harmful (Staples v. United States, 114 S. Ct. 1793, 1800 (1994)), "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country" (id. at 1799) and therefore "owning a gun is usually licit and blameless conduct" (id. at 1801). Thus, the "potential" for danger

that Ursery concedes is sufficient to make forfeiture of firearms "plainly more remedial than punitive" (Ursery Br. 30) flows from use of those firearms in violation of the criminal laws, which is a traditional justification for forfeiting instrumentalities of crime generally.

(1989); see also Rutledge v. United States, No. 94-8769 (Mar. 27, 1996), slip op, 12-15 (when conviction for a greater offense is reversed on grounds that do not affect a lesser-included offense, a court generally may enter judgment on the lesser-included offense). It is meaningful to say that a criminal defendant is "in jeopardy" for lesser-included offenses whenever he is put to trial on a greater offense, because ordinarily a possible legal outcome of the proceeding is the entry of a judgment of conviction for the lesser-included crime. That plainly is not true of the purported "jeopardy" that results from the institution of civil forfeiture proceedings; there is no possibility that the court, upon finding the purported "additional element" of the forfeiture "offense" not proven, could instead enter a judgment convicting the property claimant of a crime.

Thus, both this Court's cases and a common-sense appraisal of the limited risks that Ursery actually faced in the forfeiture proceeding demonstrate that his double jeopardy claim is untenable. That acceptance of Ursery's claim would require, as his amici essentially concede (see ACLU Br. 6 n.2), the outright repudiation of a line of authority that this Court unanimously endorsed little over a decade ago in 89 Firearms simply adds to the heavy burden of justification that his claim faces in this Court. Compare United States v. Felix, 503 U.S. 378, 389 (1992). He has not met that burden.

2. Respondents dispute our submission that civil in rem forfeitures cannot be said to inflict "punishment" for purposes of the Double Jeopardy Clause. Respondents contend that our argument is inconsistent with Halper and Austin v. United States, 113 S. Ct. 2801 (1993), and that it would require the Court to "overrule[]" those cases (Ursery Br. 18; see also Arlt & Wren Br. 12). That is not so. A holding that the proceedings in these cases are constitutional does not require the Court to reject its holding in Halper that the "multiple punishments" doctrine of double jeopardy law precludes a punitive civil

sanction after a criminal defendant's conviction, or its holding in Austin that the Excessive Fines Clause of the Eighth Amendment applies to in rem forfeitures.

Our opening brief made two points relevant to respondents' claim that civil forfeitures under 21 U.S.C. 881 are categorically punitive. U.S. Br. 38-40. First, we noted that a single passage in Halper (which Austin later reiterated) suggested that a sanction that acts in any part as a deterrent must be viewed as "punishment," but we explained that that passage is unjustifiably broad and unnecessary to the holding in either Halper or Austin. Second, we noted that Austin expressly recognized that it did not make any difference, in the context of an Eighth Amendment claim, whether all forfeitures under 21 U.S.C. 881(a)(4) and (a)(7) are categorically deemed to be "punishment," since only "excessive" forfeitures would be barred. Thus, two key legal propositions on which respondents base their claims that civil forfeiture under 21 U.S.C. 881 is always punishment for double jeopardy purposes are dicta. An argument that the Court should disavow those propositions cannot fairly be read as seeking the overruling of Halper and Austin; it merely "invok[es] [the Court's] customary refusal to be bound by dicta." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 391 (1994); see also Metropolitan Stevedore Co. v. Rambo. 115 S. Ct. 2144, 2149 (1995); Kokkonen v. Guardian Life Ins. Co. of America, 114 S. Ct. 1673, 1676 (1994).

This Court's most recent forfeiture decision, Bennis v. Michigan, 116 S. Ct. 994 (1996), shows that respondents' reading of Halper and Austin is overbroad. Bennis rejected the claim that an innocent owner has a constitutional defense to the forfeiture of property that "facilitated and was used in criminal activity." Id. at 1001. In so doing, the Court made clear that "forfeiture * * * serves a deterrent purpose distinct from any punitive purpose," id. at 1000—i.e., that deterrence itself is not

punitive and that a deterrent purpose is not sufficient to transform a forfeiture into "punishment." The Court thus declined to depart from its "longstanding practice" (id. at 1001) in civil forfeiture cases, a practice that is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," ibid. (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

That long common-law lineage of civil forfeitures of property used to commit or facilitate crimes is especially significant in assessing respondents' claims of former jeopardy, because "[i]n applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept * * *, a long course of adjudication in this Court carries impressive authority." Gore v. United States, 357 U.S. 386, 392 (1958); see also Richardson v. United States, 468 U.S. 317, 325-326 (1984); Green v. United States, 355 U.S. 184, 199 (1957) (Frankfurter, J., dissenting). Austin concluded that civil forfeitures of instrumentalities of crime always have been understood as embodying an element of punishment, which is sufficient to bring the Eighth Amendment into play. 113 S. Ct. at 2807-2809. Respondents, however, cannot show that those forfeitures ever have been deemed sufficiently punitive to trigger double jeopardy protections. Indeed, they do not cite a single case from this Court that has so held.

That failure is telling, because the Fifth Amendment has been on the books since 1791 and laws that authorized both a civil forfeiture of property used to commit crimes and a criminal prosecution of the property's owner were among the earliest statutes enacted by Congress.³

Indeed, in one of its earliest forfeiture decisions, this Court noted (in rejecting, ironically, the claim that the government was *required* to prosecute criminally before it could obtain an *in rem* forfeiture) the accepted practice of imposing both sanctions:

Many cases exist, where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. [Rather,] the practice has been, and so this Court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.

The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.); see also In re Lezynsky, 15 F. Cas. 397, 400-401 (C.C.S.D.N.Y. 1879) (No. 8,279) (noting that early statutes frequently called for criminal prosecution of persons whose property was also civilly forfeitable).4

unloading (he was required to pay a fine and was barred from holding federal office or employment, and in addition his name was to be published "in the public gazette of the State in which he resides, within twenty days after * * * conviction"), but it also mandated forfeiture in rem of the offending property. See Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39. That provision was hardly an anomaly. See § 25, 1 Stat. 43 (monetary fine on persons convicted of knowingly concealing or buying illegally imported goods in addition to the in rem forfeiture of the goods): § 34, 1 Stat. 46 (up to six months' imprisonment on persons convicted of re-landing goods entitled to a drawback in addition to the in rem forfeiture of the goods, the vessels carrying them, and any boats used in loading and unloading them). Similar provisions were included in customs statutes enacted after the Bill of Rights was ratified. See Act of Aug. 4, 1790, ch. 35, §§ 27, 49, 60, 1 Stat. 163, 170, 174; Act of Mar. 2, 1799, ch. 22, §§ 50, 69, 82, 1 Stat. 665, 678, 692. Those provisions were codified in substantially similar form in Sections 2873, 2874, 3049 and 3082 of the Revised Statutes (1874).

³ Austin relied on the first comprehensive customs statute, enacted two months before Congress proposed the Bill of Rights to the States, to demonstrate that the Framers of the Eighth Amendment considered in rem forfeiture, at least in part, as a punitive measure. 113 S. Ct. at 2807-2808. The provision cited by Austin forbade unloading goods at night or without a permit. It provided not only for criminal punishments for any ship master who permitted such

⁴ No question concerning the validity of such "dual" enforcement schemes was even raised until Coffey v. United States, 116 U.S. 436 (1886), held that an acquittal in a criminal trial precluded relitigation of the same facts in a civil in rem proceeding. See United

The fact that civil forfeiture has never been thought sufficiently punitive to raise double jeopardy concerns when Congress provides for it in addition to the criminal prosecution of the property's owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." United States v. Curtiss-Wright Corp., 299 U.S. 304, 327-328 (1936); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 728 n.2 (1988); Bowsher v. Synar, 478 U.S. 714, 723-724 & n.3 (1986); Marsh v. Chambers, 463 U.S. 783, 790-792 (1983). Indeed, this Court unanimously rejected a double jeopardy claim comparable to that of respondents in Various Items of Personal Property V. United States, 282 U.S. 577, 581 (1931), see U.S. Br. 21-a decision that respondents sub silentio would apparently have this Court overrule.

Amicus ACLU attempts to downplay the significance of the historical record by asserting that early in rem forfeiture statutes applied only to illegally imported merchandise, the equivalent of forfeiting illegal contraband.

States v. Olsen, 57 F. 579, 584-585 (N.D. Cal. 1893) (discussing Coffey and noting that "until recently no question has been raised as to the right of the government to proceed in one action for the forfeiture of the offending thing, and in another for the punishment of the offender"); see also Rufus Waples, Treatise on Proceedings In Rem § 21, at 23-24 (1882). Coffey was ambiguous on the extent to which its conclusion was based on double jeopardy law, see 89 Firearms, 465 U.S. at 358, 361, and the lower courts continued to adhere to the view that an in rem forfeiture of property and the criminal prosecution of its owner were not barred by double jeopardy. See, e.g., United States v. Three Copper Stills, 47 F. 495, 499 (D. Ky. 1890) ("[t]here is no case known to me which decides that [double jeopardy] includes a proceeding in rem"); Olsen, 57 F. at 584-585; but see United States v. One Distillery, 43 F. 846, 853 (S.D. Cal. 1890) (relying in part on Coffey to hold that government could not bring both civil forfeiture action and criminal prosecution), aff'd on other grounds, 174 U.S. 149, 152 (1899). This Court expressly overruled Coffey in 89 Firearms, where it acknowledged that "for nearly a century" Coffey's "analytical underpinnings * * * ha[d] been recognized as less than adequate." 465 U.S. at 361.

ACLU Br. 11, 22; see also Ursery Br. 29-30. As is clear from the Act of July 31, 1789, however, those statutes frequently required the forfeiture of the boats and vessels that facilitated the unlawful activity in addition to the merchandise itself. Nor were the early in rem forfeiture provisions limited to customs laws. From 1789 to 1819, multi-faceted enforcement schemes, employing in personam penalties in conjunction with in rem forfeiture, were used in statutes that regulated the registration of vessels; ⁶ required the licensing of vessels employed in coastal trade and fisheries; ⁶ prohibited trade with Indian tribes without a license; ⁷ penalized the outfitting and arming of vessels intended to be used in the service of a foreign state; ⁸ outlawed the importation of slaves from foreign countries; ⁹ and criminalized acts of pi-

⁵ See Act of Sept. 1, 1789, ch. 11, §§ 35-36, 1 Stat. 65 (providing for the forfeiture of any vessel using a fraudulent certificate of registry and penalizing the person who committed the fraud), reenacted in Act of Dec. 31, 1792, ch. 1, §§ 27-28, 1 Stat. 298.

⁶ See Act of Feb. 18, 1793, ch. 8, §§ 30, 32, 1 Stat. 316 (providing for the forfeiture of any vessel, as well as its cargo, with a forged or altered license and penalizing the person who falsified the license).

⁷ Act of Mar. 1, 1793, ch. 19, § 3, 1 Stat. 329 (imposing fine or imprisonment, or both, on any person attempting to trade with Indian tribes without a license and providing for the forfeiture of all merchandise in that person's possession).

⁸ See Act of June 5, 1794 (the "Neutrality Act"), ch. 50, § 3, 1 Stat. 383 (in addition to forfeiture of the vessel and all materials and ammunition "procured for the building and equipment thereof," "every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor").

⁹ See Act of Mar. 2, 1807, ch. 22, § 2, 2 Stat. 426 (any ship or vessel fitted out for the importation of slaves from foreign countries "shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts, for the district where the said ship or vessel may be found or seized"); § 3, 2 Stat. 426 (any person who so fits out a vessel, knowing it to be used for that purpose, shall "forfeit and pay twenty thousand dollars"). See also § 4, 2 Stat. 427 (any per-

racy.¹⁰ Similar provisions were commonly found in later statutes regulating the taxation of distilled spirits ¹¹ and banning the importation of immigrant laborers.¹²

Ursery and amicus ACLU attempt to recast Austin as holding that 21 U.S.C. 881 always inflicts "punishment," even if other forfeitures of property used to commit crimes generally would not be punitive. See Ursery Br. 22-23; ACLU Br. 11-17. That turns Austin on its head. While Austin did examine specific features of 21 U.S.C. 881(a)(4) and (a)(7), it did so only to ascertain whether anything in the text or history of those provi-

son who takes a slave on board his ship with the intent to sell the slave in the United States shall forfeit and pay five thousand dollars, and the ship and all of its cargo shall be liable for seizure); § 7, 2 Stat. 428 (any vessel caught with a slave on board within United States waters in violation of the Act shall be forfeited, along with all of its cargo and effects, and the captain, master, or commander of the vessel shall be subject to prosecution for a high misdemeanor). Similar provisions were reenacted in the Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

¹⁰ See Act of Mar. 3, 1819, ch. 77, §§ 4-5, ② Stat. 513-514 (punishing acts of piracy on the high seas with death *and* providing for the forfeiture, in any court having admiralty jurisdiction, of any vessel involved in piratical aggression).

11 See, e.g., Act of July 13, 1866, ch. 184, § 14, 14 Stat. 151 (providing for in rem forfeiture of distilled spirits—as well as any materials, utensils, or vessels used in their making—that are removed or concealed with the intent to defraud the revenue and imposing fine on any persons concerned in such intentional removal or concealment (codified at Rev. Stat. § 3450 (1874)); Act of July 20, 1868, ch. 186, § 19, 15 Stat. 133 (imposing fine and imprisonment on any person who makes a false entry in books with intent to defraud the revenue and providing for in rem forfeiture of the distillery, distilling apparatus, the tract of land on which it stands, and all personal property on the premises used in the distilling business) (codified at Rev. Stat. § 3305 (1874)). See also Rev. Stat. § 3257, 3281 & 3451.

¹² See Act of July 5, 1884, ch. 220, §§ 2, 10, 23 Stat. 115, 117 (providing that vessel may be libelled if vessel master knowingly transports Chinese laborers in violation of the Act and providing that master shall be guilty of a misdemeanor).

sions "contradict[ed] the historical understanding of forfeiture as punishment." 113 S. Ct. at 2810. The Court concluded that the legislative background of 21 U.S.C. 881 did not dispel what the Court believed always has been true of all forfeitures of property used in the commission of crime—that they "historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. In light of the Court's assimilation of 21 U.S.C. 881(a)(4) and (a)(7) to the traditional understanding of provisions forfeiting property used to commit crimes, Austin cannot now be turned into a special rule for narcotics forfeiture cases.

Amicus ACLU argues that forfeitures of instrumentalities under Section 881 do not serve the traditional aims of that in rem remedy, because "supposedly remedial objectives are nowhere mentioned in the legislative history." Br. 12. An Act of Congress, however, is not deemed to serve only those objectives that are described in its legislative history. See Pittston Coal Group v. Sebben. 488 U.S. 105, 115 (1988); see also Moskal v. United States, 498 U.S. 103, 111 (1990). Instead, Congress is presumed to know the law, see Callanan v. United States, 364 U.S. 587, 594 (1961), and when it enacts statutes that invoke settled legal concepts, it ordinarily must be understood to have adopted those concepts. See, e.g., Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2256-2257 (1994); see also Shannon v. United States, 114 S. Ct. 2419, 2425 (1994). Thus, by enacting an in rem remedy with a long-standing lineage and recognized rationale, Congress subscribed to the traditional aims of that remedy and "expect[ed] its enactment[] to be interpreted in conformity with them." North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1930 (1995). No argument advanced by the ACLU establishes otherwise. 18

¹³ The *in rem* label, of course, is not dispositive of the constitutional analysis. See ACLU Br. 11. But whether a forfeiture statute would be recognized as remedial by the Framers turns on whether it serves the purposes of the early forfeiture statutes that

Ursery also argues (Br. 24-25), that the forfeiture of his property should be deemed "punishment" for double jeopardy purposes under a *Halper* case-by-case analysis. That argument is unsound because it relies on a "presumption" (Br. 24) in Ursery's favor. Respondent, however, is the party asserting former jeopardy, and he is required affirmatively to establish his entitlement to that defense. See, e.g., Schiro v. Farley, 114 S. Ct. 783, 791-792 (1994); Dowling v. United States, 493 U.S. 342, 350 (1990). He has failed to show that the civil sanction in the forfeiture action bears such a lack of proportion to the harms resulting from his multi-year marijuanamanufacturing operation that it must be branded as punitive. See U.S. Br. 46.14

were familiar to the Framers. As this Court's recent decision in Bennis shows, the correct analysis does not turn, as amicus suggests (see ACLU Br. 12, 16), on purely formal matters, such as whether forfeiture was available at common law for the particular violation of law. Bennis recognized that, for constitutional purposes, the remedial ends of forfeiture can be advanced even in a civil proceeding in personam. Nor does the correct analysis depend on whether Congress has provided for an analogous remedy as part of a criminal sentence, as it did when it enacted criminal forfeiture statutes. Congress has also provided that criminal sentences may require the defendant to pay restitution to his victims, see 18 U.S.C. 3556, yet no one would suggest that the availability of that remedy as part of a criminal sentence necessarily renders the goal of victim compensation inherently punitive.

14 For the same reason, Ursery errs in asserting that, as a factual matter, the forfeiture action and the prosecution were based on the same offense. See Ursery Br. 40-42. We do not, of course, dispute the proposition that a single criminal offense cannot be broken down into separate "theories"; that assertion, however, begs the question of what the unit of prosecution is, and Ursery cannot seriously contend that growing marijuana over several years, season in and season out, constitutes a single crime of manufacturing marijuana. Because the forfeiture complaint alleged that respondent did precisely that, he cannot sustain his burden of showing that the consent judgment necessarily rests on the manufacturing offense for which he was criminally prosecuted. Compare Schiro v. Farley, 114 S. Ct. at 792.

3. Respondents Arlt and Wren argue that the forfeiture of their narcotics proceeds under 21 U.S.C. 881(a)(6) constituted "punishment." As we explained in our opening brief, however, separating a criminal from the proceeds of his crimes cannot fairly be characterized as "punishment." ¹⁵ Arlt and Wren dispute that conclusion (Br. 16-31), claiming that the forfeiture of such proceeds amounts to the "taking of lawful property" (Br. 19) for a punitive purpose by the government. In support of that claim, they note that proceeds of narcotics trafficking represent not only the profits of that activity but also "some investment" of legitimate "capital and of labor in the economic endeavor." Br. 30.

The proceeds of drug trafficking, however, are not "lawful" property. That conclusion becomes apparent when respondents' activities are broken down into their component parts. Arlt and Wren invested capital and labor in the purchase and production of contraband; they then sold that contraband to obtain the properties that are the subject of this forfeiture action. They concede (Br. 27) that, notwithstanding their investment of time and legitimate capital, the contraband could have been forfeited without imposing punishment on them. See Austin, 113 S. Ct. at 2811; 89 Firearms, 465 U.S. at 364. It follows that they have no greater right to possess the proceeds of the sale of that contraband; indeed, the fact that the government seeks to forfeit proceeds instead of contraband is a fortuitous result of the point at which the authorities interrupted respondents' criminal venture. Simply put, capital invested in illegal activity loses its

¹⁵ Respondents assert (Arlt & Wren Br. 23-24) that the assets forfeited from them constituted more than the proceeds of illegal activity. The district court's findings of fact and conclusions of law, however, demonstrate that the court found that all of the defendant properties constituted the proceeds of respondents' illegal methamphetamine trade. See 95-346 Pet. App. 55a-66a. Only after reaching that conclusion did the court consider whether the defendant properties also were subject to forfeiture under 18 U.S.C. 981(a) (1) as property "involved in" money laundering violations.

legitimate character: the labor involved in an illegal enterprise is not "honest labor" that is entitled to societal recognition, and the owner of property from the sale of drugs "has no reasonable expectation that the law will protect, condone, or even allow his continued possession of such proceeds." *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994). See also *United States* v. *Clementi*, 70 F.3d 997, 1000 (8th Cir. 1995).

Arlt and Wren maintain (Br. 26-28) that the forfeiture of proceeds constitutes punishment because the
owner of property derived from a drug transaction may
validly transfer the property to a bona fide purchaser or
an innocent donee. See *United States* v. 92 Buena Vista
Ave., 507 U.S. 111, 127 (1993) (plurality). The statutory innocent owner defense, however, depends on a
showing of the transferee's lack of knowledge of the illegal
source of the funds; it does not presuppose a free-standing
lawful right to possess such proceeds in the transferor.¹⁶
See 21 U.S.C. 881(a)(6). Recognition of that defense
accommodates and protects routine and good faith commercial activity. It does not change the fact that the
illegal proceeds themselves are simply a substitute for the
contraband that produced them.

Finally, there is also no substance to respondents' contention (Arlt & Wren Br. 25-26) that the forfeiture of drug proceeds is punitive because such forfeitures are not intended to provide restitution to a victim but in-

stead to repay the government for "all of society's costs of drug abuse." The forfeiture of drug proceeds is remedial because it deprives a wrongdoer of property that he did not lawfully obtain. Thus, it is similar to disgorgement, which is a remedial measure that does not invariably result in restitution to the wrongdoer's victims. See Texas American Oil Corp. v. Department of Energy, 44 F.3d 1557, 1569-1570 (Fed. Cir. 1995) (en banc) (disgorgement is a remedial measure distinct from restitution); SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement is remedial whether victims of wrongdoing are private citizens or government); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain"). See also Tull v. United States, 481 U.S. 412, 422-423 (1987) (contrasting a requirement that a defendant "disgorge profits," which is equitable in nature, with a statutory requirement intended to inflict "punishment"). The bank robber who is arrested as he exits the bank does not acquire immunity from prosecution when the stolen money is seized from him, irrespective of whether the money is ultimately returned to the bank. Indeed, if the government were to keep the money, its actions might be wrongful as to the bank, but they would not confer any constitutional rights on the robber. 17

^{\$10,000} bank loan to buy cocaine misses the mark for the same reason. Although the \$10,000 constitutes "money[] * * intended to be furnished * * in exchange for a controlled substance" and thus would be subject to forfeiture under Section 881(a)(6), the bank would be entitled to assert a statutory innocent owner defense against a forfeiture action brought against the money. Moreover, because this case involves "proceeds traceable" to a drug transaction, and not money intended to be furnished for such an exchange, respondents' hypothetical has little bearing on the facts of this case.

¹⁷ Proceeds forfeitures also serve the remedial purposes of compensating the government for the costs of investigating and prosecuting the underlying offenses and of defraying the societal cost of drug abuse. See, e.g., United States v. \$184,505.01, 72 F.3d 1160, 1168-1169 (3d Cir. 1995); Tilley, 18 F.3d at 299-300. But because the forfeiture of illegally obtained property will always be directly proportional to the remedial purpose of disgorging illegal gains and preventing unjust enrichment, recourse to its other remedial purposes is not necessary to find that the forfeitures at issue in \$405,089.23 are not punitive. Contrary to respondents' contention (Arlt & Wren Br. 25), therefore, the government need not support the forfeiture of illegal proceeds by establishing its costs of its investigation and prosecution of the underlying offenses.

- 4. Respondents defend the Sixth and Ninth Circuits' conclusion that forfeiture is a greater "offense" of the crimes that give rise to the forfeiture. See Arlt & Wren Br. 44-48; Ursery Br. 35-39. As we have explained, that characterization is anomalous, because the two "offenses" lack the characteristics ordinarily associated with greater and lesser offenses. That anomaly is not lessened by respondents' attempt to analogize the forfeiture "offense" to felony-murder. The Court's conclusion that felonymurder is the "same offense" under Blockburger v. United States, 284 U.S. 299 (1932), as the underlying felony flows from its characterization of felony-murder as nothing more than an aggravated form of that felony. See Whalen v. United States, 445 U.S. 684, 694 (1980) (double jeopardy analysis of felony-murder is the same as if the legislature "had separately proscribed the six different species of felony murder under six statutory provisions"). The fact that a State has a single felony-murder statute that incorporates all qualifying felonies, rather than a separate aggravation clause in each statute that defines a qualifying felony, has been deemed insufficient to change that analysis. That analysis cannot be extended, however, to characterize a civil sanction as an aggravated form of a serious criminal offense.
- 5. Respondents argue that the parallel civil and criminal actions at issue in these cases cannot be the "same proceeding" for purposes of the multiple-punishments doctrine. They argue that the record in Kurth Ranch reflected several parallel cases against the taxpayers and yet that did not preclude the Court's conclusion that one of those proceedings violated the Double Jeopardy Clause. See Ursery Br. 45; Arlt & Wren Br. 39-40. That point, however, was not briefed or argued in Kurth Ranch, and therefore that case "is a singularly unlikely source for a holding" (Rutledge v. United States, supra, slip op. 11 n.13) that parallel civil and criminal actions can never be the same proceeding for double jeopardy purposes. See United States v. Shabani, 115 S. Ct. 382, 386

(1994) ("[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred"); see also *United States* v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952).

As a matter of doctrine, respondents' reliance on the formal existence of two proceedings is not sufficient to establish the existence of separate actions for double jeopardy purposes. See United States v. DiFrancesco, 449 U.S. 117 (1980) (upholding government sentencing appeals). Rather, as DiFrancesco indicates, a double jeopardy claimant must demonstrate an invasion of a legitimate expectation of finality in his sentence. A proceeding is not impermissibly successive for purposes of the multiple-punishments doctrine unless it defeats that expectation. Respondents have no reasonable argument that the second proceeding defeated any legitimate expectation of finality; nor can they sustain a claim that the abuse against which the Double Jeopardy Clause guards (i.e., the institution of a second proceeding "because [the government] is dissatisfied with the sanction obtained in the first proceeding," Halper, 490 U.S. at 451 n.10) is present. Instead, they offer an array of policy arguments and "rigid, mechanical" tests (Serfass v. United States, 420 U.S. 377, 390 (1975)) that they believe will better serve the "purposes" of the Double Jeopardy Clause. See Arlt & Wren Br. 34-36; Ursery Br. 44-47. Those purposes, however, "are more likely to be honored by following longstanding practice than by following intuition." United States v. Dixon, 113 S. Ct. 2849, 2863 n.15 (1993). In challenging the institution of parallel civil and criminal proceedings, respondents have failed to offer a credible basis for departing from the practice that our Nation has followed for the last 200 years.

For the foregoing reasons and those stated in our opening brief, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III Solicitor General

APRIL 1996

Nos. 95-345 and 95-346

Supreme Court, U.S. F I L E D

CLERK

In the

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner.

V.

GUY JEROME URSERY,

Respondent.

&

UNITED STATES OF AMERICA,

Petitioner.

V

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23)
IN UNITED STATES CURRENCY, ET AL.,
Respondent.

On Writ of Certiorari
To the United States Courts of Appeals
For the Ninth and Sixth Circuits

BRIEF OF THE STATE OF CONNECTICUT, 47
STATES, AND THE COMMONWEALTH OF
PUERTO RICO AS AMICI CURIAE
IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The amici states seek reversal of the decisions in the consolidated cases granted review. Those cases misinterpreted United States v. Halper, 490 U.S. 435 (1989); Austin v. United States, 113 S. Ct. 2801 (1993); and Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994), and thereby wrongfully expanded the Double Jeopardy Clause. Analysis similar to that employed by the Ninth and Sixth Circuits has already caused a deluge of double jeopardy litigation in far-reaching areas of traditional state criminal and civil regulation. This Court's decision will directly affect the states' ability to enforce their laws and avoid disruption to the orderly business of criminal and civil adjudication in such varying areas as unemployment compensation, drivers licensing, prison discipline and prosecutions of all types of criminal offenses.

Moreover, although the decisions below construed the federal civil forfeiture statute, 21 U.S.C. § 881 (1994), every state has a civil forfeiture statute, many patterned after § 881. Even states with statutory forfeiture patterns unlike the federal statute have faced or will face double jeopardy challenges based on the decisions below. The states use civil forfeiture as an essential instrument in their efforts to remedy the consequences of criminal conduct which risks or

¹ E.g., In re One 1987 Toyota, 621 A.2d 796, 798 (Del. Super. Ct. 1992) (Delaware statute "modeled closely upon" § 881); Idaho Dept. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County, 885 P.2d 381, 383 (Idaho 1994) (Idaho statute "virtually identical to" § 881).

² E.g., Ariz. Rev. Stat. Ann. §§ 13-4301 to 13-4315 (Supp. 1994); Kan. Stat. Ann. §§ 65-4135 to 65-4175 (1992). See also Commission Reform Act of 1994, drafted by the President's Commission on Model State Drug Laws.

harms the public health or safety. Forfeiture has proven its effectiveness in disrupting criminal enterprises, removing essential materiel, preventing capitalization of illegal business and limiting the economic power and personal enjoyment derived from illegal proceeds. The decisions of the courts below would severely limit the ability of the states to use that vital tool.

SUMMARY OF ARGUMENT

1. The Ninth and Sixth Circuits misapplied and expanded this Court's double jeopardy jurisprudence. Relying on dictum in United States v. Halper, 490 U.S. 435 (1989), the courts below held that a civil sanction which is not solely remedial cannot be imposed in addition to a criminal punishment. Such an interpretation conflicts both with the actual holding of Halper and with the later decision in Department of Revenue v. Kurth Ranch, 114 S. Ct. 2801 (1993). Those cases held that civil sanctions which cannot "fairly be characterized as remedial, but only as a deterrent or retribution," are "punishment" for double jeopardy purposes. Halper, 490 U.S. at 448-449 (emphasis added); Kurth Ranch, 114 S. Ct. at 1952. Thus, the Ninth and Sixth Circuits turned the inquiry on its head. Those courts based their decisions on Austin v. United States, 113 S. Ct. 2801 (1993), which was not a double jeopardy case but instead addressed whether a federal civil forfeiture statute can be deemed punishment so as to come within the term "fine" in the Eighth Amendment's Excessive Fines Clause.

The Ninth and Sixth Circuits also erred by failing to assess the nature of the sanction and its remedial goals. This Court in Halper and Kurth Ranch clearly stated that double

jeopardy analysis requires a "particularized assessment" of each sanction and its purposes. *Halper*, 490 U.S. at 448; *Kurth Ranch*, 114 S. Ct. at 1948. The courts below ignored that requirement, holding that all forfeitures are punishment for purposes of double jeopardy and therefore invalidating the entire proceeding.

- 2. Litigants and courts applying the improper analysis employed by the Ninth and Sixth Circuits have produced a flood of double jeopardy litigation in state courts. Civil claimants and criminal defendants have challenged penalties and sanctions in areas in which states have traditionally exercised legitimate regulatory power, including drivers licensing, professional licensing, business regulation and prosecutions of crime. These claims are crippling the ability of the states to pursue civil and criminal justice in a timely and orderly manner. Affirmation of the decisions below would continue this disruption of states' administration of their civil and criminal laws and destroy many state regulatory programs.
- 3. With respect to forfeiture specifically, under a correct application of Halper and Kurth Ranch's double jeopardy jurisprudence, forfeiture of the proceeds of a crime is always remedial and therefore outside the Double Jeopardy Clause. Such forfeiture merely removes illegal profits to which the possessor has no lawful property right and prevents use of illegally gained assets to expand criminal activity. Forfeiture of assets which facilitate crimes is similarly remedial because it disrupts drug trafficking by taking away the tools that a drug trafficker needs to ply his trade.

4. Finally, although the decisions below can be reversed in accord with the actual holding of *Halper*, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted *Halper*, the amici states believe that *Halper* should be reconsidered and overruled. Applying the Double Jeopardy Clause as the courts below did does not further the Clause's aims, and would continue to create judicial confusion over many difficult issues, resulting in unfair and inconsistent results and vexatious litigation.

ARGUMENT

IMPOSITION OF BOTH CIVIL FORFEITURE, OR OTHER CIVIL SANCTIONS, AND A CRIMINAL CONVICTION AND SENTENCE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Double Jeopardy Clause has been held to prohibit "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. at 440. Until Halper, it was generally understood that the Double Jeopardy Clause applied only to criminal prosecutions or those few proceedings labeled civil, but deemed to be in fact criminal and thus to require the constitutional safeguards provided to criminal defendants. See Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (risk to which the Clause refers is not present in proceedings that are not essentially criminal); Breed v. Jones, 421 U.S. 519, 528 (1975) ("In the

constitutional sense jeopardy describes the risk that is traditionally associated with a criminal prosecution."); United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Thus, there was a fairly clear distinction between criminal and civil penalties. Criminal penalties were those which resulted from criminal or "criminal-like" proceedings. See Linda S. Eads, Separating Crime from Punishment, The Constitutional Implications of United States v. Halper, 68 Wash. U. L.Q. 929 (1990).

this Court departed from that Halper, understanding of double jeopardy jurisprudence and held that a sanction imposed in a civil proceeding could be deemed punishment for purposes of double jeopardy. The Court held that some civil sanctions, or portions thereof, serve only deterrent or retributive purposes because they are not rationally related to remedying the government's damages. Relying solely on the multiple punishment prong of double jeopardy analysis, the Court then determined that in certain very limited situations such sanctions are punishment for double jeopardy purposes and cannot stand after the imposition of a criminal punishment. Halper, 490 U.S. at 449. However, the court stated that both such punishments could be imposed in a single proceeding. Halper, 490 U.S. at 450.

The courts below misapplied Halper and two subsequent cases: Austin v. United States, 113 S. Ct. 2801 (1993), an Eighth Amendment case; and Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994). Because other litigants have adopted their analysis, states have been inundated with meritless double jeopardy claims. This has

wrongfully threatened enforcement of an array of civil sanctions including the civil forfeiture sanction. This Court should reaffirm that civil sanctions implicate the Double Jeopardy Clause in only the rarest of proceedings.

A. The Sixth and Ninth Circuits Misapplied and Expanded The Double Jeopardy Doctrine of Halper and Kurth Ranch.

The two Courts of Appeal below misconstrued the double jeopardy jurisprudence enunciated in *Halper*, and expanded it beyond the bounds previously delineated in at least three crucial ways.

First, the courts below unduly expanded the concept of "punishment" for a double jeopardy assessment of civil sanctions. They did so by relying on dictum in Halper and ignoring its actual holding. Both courts held that a sanction which has any deterrent or retributive purpose or effect, regardless of its overall remedial goals, must be considered punishment. The courts relied on the following dictum in Halper: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448.

The actual holding of *Halper*, however, was to a very different effect:

We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-449 (emphasis added). Thus a civil sanction implicates double jeopardy if it can "only" be characterized as a deterrent or retribution and has no remedial function.³

Instead of following this clear teaching from the double jeopardy cases, the Ninth and Sixth Circuits relied on the use of the "solely remedial" language in *United States v. Austin*, 113 S. Ct. at 2812. However, *Austin* involved a different constitutional provision from *Halper* and accordingly used a different analysis. *Austin's* excessive fines analysis characterized all forfeitures, including purely remedial ones, as punishment for purposes of the term "fine" in the Excessive Fines Clause. 113 S. Ct. at 2812 n. 14. Moreover, that was only a threshold determination, and a remand was necessary to determine if the fine was excessive. *Halper*, by contrast, did not characterize remedial sanctions as punishment, and its determination that a sanction was punishment decided the ultimate issue and invoked the

In Kurth Ranch, this court reiterated the Halper holding, with no reference to the "solely remedial" dictum. 114 S. Ct. at 1945. See also Kurth Ranch, 114 S.Ct. at 1952 (Rehnquist, C.J., dissenting) (proper inquiry is whether a sanction "can only be explained as serving a punitive purpose.") (emphasis added); Id. at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective.") (emphasis added).

Double Jeopardy Clause. Thus, Austin cannot support the lower courts' expansion of the double jeopardy doctrine.

Second, the two circuit courts ignored Halper's direction to undertake, for double jeopardy analysis, a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." Halper, 490 U.S. at 448. See also Kurth Ranch, 114 S. Ct. at 1948 (specific analysis that applies to determine whether a sanction is punishment for a double jeopardy claim varies depending on the sanction under consideration). Such a "rule... of reason" permits application of double jeopardy principles only in the "rare case" where the civil penalty in application bears no rational relation to a remedial goal so that it "in fact constitutes a second punishment." Halper, 490 U.S. at 446, 449-50.

Rather than following this mandate, and determining the nature of the remedial goals of the forfeiture sanction, the courts below relied on the Eighth Amendment analysis of Austin to hold that all forfeitures are punishment. That reliance was unfounded. Austin did not change the Halper rule by adopting a categorical approach to the concept of punishment for forfeiture or any other sanction. In fact, Austin acknowledged the individual nature of the Halper double jeopardy inquiry. Austin, 113 S. Ct. at 2812 n.14. It is true that in addressing the Eighth Amendment definition of the term "fine," Austin focused on the federal civil forfeiture statute as a whole. However, that inquiry was only the first step in the Eighth Amendment analysis, and the Court remanded the case for a determination of whether the particular forfeiture at issue was remedial or non-remedial and therefore "excessive." Id., 113 S. Ct. at 2812 n.14.

Had the court intended the categorical approach to forfeitures used by the Ninth and Sixth Circuits, there would have been no need for a remand.

Third, the courts below erred in dismissing the second sanction rather than amending the civil sanction to comply with double punishment limitations set out in *Halper*. Blanket dismissal leads to the anomalous circumstance that an entire remedy is negated if it is a single dollar over the level at which a remedial sanction becomes punitive. Such a result conflicts with *Halper*'s directive to assess so much of the potential civil judgment as is not punitive, after a particularized view of the remedial goals of the civil action involved and the circumstances of the specific case.

In sum, contrary to the decisions below, punishment occurs only in the "rare case" where there is an egregiously excessive civil sanction that is not reasonably related to a remedial purpose. Even then, the entire sanction need not necessarily be barred. Only that portion which is unrelated to the remedial goals may be considered punishment.

⁴ The Ninth Circuit also mistakenly held that coordinated, parallel civil and criminal proceedings could never be considered the same proceeding so as to comply with Halper's teaching that there is no double jeopardy violation is the civil and criminal sanctions, no matter their extent, are applied in the same proceeding. The Sixth Circuit did not adopt a categorical rule, but mistakenly determined that in the case before it there was insufficient evidence of coordination of actions to find one proceeding. Neither court used the correct analysis. Parallel civil and criminal proceedings for the same conduct may be deemed one proceeding for double jeopardy purposes so long as the timing of the actions does not permit repeated attempts to achieve in a second action what the government did not accomplish in the first. This kind of oppressive abuse by an initially dissatisfied government is at the heart of

B. The Double Jeopardy Analysis Employed In The Decisions Below Has Created Havoc With The States' Efforts To Perform Their Traditional Role In The Prosecution Of Crime And The Regulation Of Civil Activity.

Reasoning similar to that of the Ninth and Sixth Circuits has produced novel and vexatious double jeopardy litigation in state courts across the nation. In order legitimately to address prohibited conduct, the states increasingly rely on civil sanctions such as taxes, forfeitures, drivers license suspensions, professional disciplinary sanctions and exclusion from participation in public programs. Many of these civil sanctions are imposed for conduct that is also subject to criminal prosecution and punishment. However, double jeopardy analysis such as that used by the Ninth and Sixth Circuits casts into doubt the authority of the states to apply civil sanctions in addition to

the double jeopardy concern. Absent that potential, there is only one jeopardy. See United States v. Millan, 2 F.3d 17 (2d Cir. 1993), cert. denied, sub nom., Bottone v. United States, 114 S. Ct. 922 (1994); United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, 13 F.3d 1493 (11th Cir. 1994). The amici, however, will leave to the United States to argue the facts of the particular proceedings involved here.

In addition, the Sixth Circuit also erred in finding that the forfeitures and the criminal convictions were based on different offenses under the traditional double jeopardy test of Blockburger v. United States, 284 U.S. 299 (1932), which requires a determination of whether each "offense" requires proof of an element not included in the other. See also United States v. Dixon, 113 S. Ct. 2849 (1993). Because that determination is necessarily based on the specific statutory elements involved in a particular case, the amici states will not argue that issue here, but support the United States in its argument.

criminal prosecution. Furthermore, that kind of double jeopardy reasoning has disrupted the orderly process of criminal justice by leading either to dismissals of criminal charges following a civil sanction or to interlocutory appeals of the denial of those dismissals, regardless of the facial frivolity of the claim.

The states have faced challenges to criminal prosecutions and civil sanctions in cases ranging from homicide to sexual assaults to disqualification from public office to professional discipline. For example, most, if not all, states have faced challenges to the criminal prosecution of drunk driving charges because of prior drivers license suspensions for the same conduct. In Connecticut, a trial court dismissed such a prosecution based on its reading of the Halper line of cases. Analyzing the double jeopardy issue much as the Ninth and Sixth Circuits did here, the trial court held that drivers license suspension could not be deemed "solely" remedial and therefore constituted "punishment," barring a criminal punishment for the same conduct. State v. Hickam, No. MV94 618025, 1995 Conn. Super. LEXIS 1215 (Apr. 20, 1995), rev'd, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). The Connecticut Supreme Court, analyzing the issue differently, held the license suspension remedial rather than punitive and reinstated the prosecution. State v. Hickam, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). By contrast, an Ohio Court of Appeals agreed with a defendant's double jeopardy reasoning and refused to reinstate the drunk driving

prosecution. State v. Gustafson, No. 94 C.A. 232, 1995 Ohio App. LEXIS 2790 (Jan. 27, 1995).5

Some state trial courts have dismissed criminal prosecutions after imposition of a civil sanction. See, e.g., State v. Hickam, 1995 Conn. Super. LEXIS 1215; State v. Hanson, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996) (reversing trial court); Small v. Commonwealth, 402 S.E.2d 927 (Va. Ct. App. 1991) (en banc); State v. Schnittgen, No. 95-384 (Mont. filed Aug. 21, 1995) (appeal pending from district court's dismissal of felony charges, holding prior termination of the defendant's employment as deputy sheriff was punishment for double

jeopardy purposes). In other cases, courts have invalidated a civil sanction following a criminal conviction for the same conduct. See, e.g., Kvitka v. Board of Registration in Medicine, 551 N.E.2d 915 (Mass.), cert. denied, 498 U.S. 823 (1990) (vacating fine imposed by medical licensing board following criminal conviction for illegal drug dispensing).

Thus, the reach of the double jeopardy analysis, as expanded in the two cases granted review, extends far beyond the civil forfeiture arena. No sooner do state attorneys believe they have seen the most extensive and frivolous permutation of these double jeopardy claims than imaginative civil claimants and criminal defendants present new challenges. The spectrum includes: claims that professional disciplinary actions bar criminal prosecution and vice versa; claim that conviction for unregistered firearms bars revocation of state liquor license for same conduct; claims that prison discipline for violent conduct bars

⁵ The Gustafson case is currently on appeal to the Ohio Supreme Court. See Gustafson, 73 Ohio St. 3d 1427 (Ohio 1995). A different Ohio appellate court came to a contrary conclusion and reinstated the prosecution. State v. Miller, No. 2-94-32, 1995 Ohio App. LEXIS 1971 (May 12, 1995), appeal allowed, 655 N.E.2d 185 (Ohio 1995).

For other challenges to drunk driving prosecutions following suspension of license, see, e.g., State v. Zerkel, 900 P.2d 744 (Alaska Ct. App. 1995); State v. Nichols, 819 P.2d 995 (Ariz. Ct. App. 1991); Freeman v. State, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992), cert. denied, 114 S. Ct. 415 (1993); State v. Higa, 897 P.2d 928 (Haw. 1995); State v. Maze, 825 P.2d 1169 (Kan. Ct. App. 1992); Butler v. Department of Pub. Safety & Corrections, 609 So. 2d 790 (La. 1992); State v. Jones, 666 A.2d 128 (Md. 1995), petition for cert. filed, 64 U.S.L.W. 3510 (U.S. Jan. 11, 1996) (No. 95-1131); State v. Savard, 659 A.2d 1265 (Me. 1995); State v. Hanson, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996); State v. Young, 530 N.W.2d 269 (Neb. Ct. App. 1995); State v. Cassady, 662 A.2d 955 (N.H. 1995); State v. Tench, 462 S.E.2d 922 (Va. Ct. App. 1995); State v. Strong, 605 A.2d 510 (Vt. 1992).

⁶ Halper involved a civil penalty imposed after a criminal prosecution. In Kurth Ranch this Court noted that it was not deciding the case in which the criminal prosecution follows the civil sanction. Kurth Ranch, 114 S.Ct. at 1947 n.21.

⁷ Schillerstrom v. State, 885 P.2d 156 (Ariz. Ct. App. 1994), cert. denied, No. CV-94-0396-PR (Ariz. Dec. 20, 1994) (revocation of chiropractic license); People v. Marmon, 903 P.2d 651 (Colo. 1995) (attorney discipline); Loui v. Board of Medical Examiners, 889 P.2d 705 (Haw. 1995) (discipline of medical doctor).

⁸ Roach Enters., Inc. v. License Appeal Comm'n, Nos. 1-95-1446, 1-95-1555, 1996 Ill. App. LEXIS 9 (Jan. 12, 1996).

subsequent prosecution for assault or homicide; chillenge to revocation of business license to operate heath spa following plea of nolo contendere to sexual ofense; challenge to negligent homicide prosecution after the for traffic violation resulting in death; claims that prior criminal conviction precludes application of statutory state constitutional bar on candidacy for public office; claims that disqualification from public benefits because of ciminal conduct bars subsequent criminal prosecution; clains that school expulsion for criminal misconduct bars deliquency adjudication; challenge to motor vehicle department assessment of "points" on driving record after convicion for

motor vehicle offenses;¹⁵ and claim that denial of accrued vacation benefits after public employment termination due to crime violates double jeopardy because of previous conviction for the crime.¹⁶

The doctrine that civil sanctions can be deemed punishment for double jeopardy purposes has even led to claims in cases involving only civil adjudication. In Ward v. Department of Pub. Safety and Correctional Servs., 663 A.2d 66 (Md. 1995), an employee was disciplined for misconduct at his job. Subsequently, he was discharged. He claimed, pursuant to Halper and its progeny, that the prior suspension was a form of punishment which constituted an "administrative" double jeopardy bar to the subsequent discharge.¹⁷

Even more surprising, the Halper doctrine has been invoked in private lawsuits. Defendants previously convicted of crimes have claimed that in private lawsuits for damages caused by the criminal conduct, punitive damages are barred under double jeopardy rules. See Whittaker v. Dail, 567 N.E.2d 816 (Ind. Ct. App. 1991), rev'd on other grounds, 584 N.E.2d 1084 (Ind. 1992); Jines v. Seiber, 549 N.E.2d 964 (Ill. App. Ct. 1990). In Oregon, a trial court dismissed

State v. Walker, 646 A.2d 209 (Conn. App. Ct.), appealdenied, 648 A.2d 159 (Conn. 1994); State v. McKenzie, No. C3-95-128, 1996 Minn. LEXIS 10 (Jan. 19, 1996).

¹⁰ Moser v. Richmond County Bd. of Comm'rs, 428 S.E.2d71 (Ga. 1993).

¹¹ Purcell v. United States, 594 A.2d 527 (D.C. 1991).

¹² McIntyre v. Miller, 436 S.E.2d 2 (Ga. 1993); Taylor v. State Election Bd., 616 N.E.2d 380 (Ind. Ct. App. 1993).

¹³ State v. Varney, No. CA94-12-013, 1995 Ohio App. LE7IS 2822 (July 3, 1995); State v. Millett, No. And-95-166, 1996 Me. lEXIS 7 (Jan. 5, 1996); State v. Duerr, No. 14871, (Conn. App. 1. filed December 29, 1995).

¹⁴ In re Dandridge, 614 So.2d 129 (La. Ct. App.), cert. dened, 616 So. 2d 684 (La. 1993); In re Gila County Juvenile Delinquency Action, 816 P.2d 950 (Ariz. Ct. App. 1991).

No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio, 624 A.2d 981 (N.J. Super. Ct. App. Div.), cert. denied, 634 A.2d 526 (N.J. 1993).

¹⁶ Stuart v. Department of Social and Rehabilitation Servs., 846 P.2d 965 (Mont. 1993).

¹⁷ At oral argument in the appeal, the claimant abandoned the constitution as a basis for his claim. Nevertheless the court explained why his claim was meritless. Ward, 663 A.2d at 69.

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a prosecution for shoplifting because the defendant had already been "punished" by paying restitution to the store owner in a civil suit. State v. Reetz, No. CA A89387 (Ore. Ct. App. filed July 24, 1995).

Finally, at least one court has extended the distorted, expansive reading of *Halper* to employ the double jeopardy analysis even where there was no prior punishment, but the claimant had been subjected to a prior proceeding. Thus, in *Crump v. Alabama Alcoholic Beverage Control Bd.*, No. 2940412, 1995 Ala. Civ. App. LEXIS 670 (Dec. 1, 1995), the court found that a civil fine was an additional penalty barred by the double jeopardy clause even though the plaintiff had previously been acquitted of the crime and therefore not punished previously.

The cases cited above are only the tip of the iceberg. In a decision filed in January, 1995, the New York Supreme Court of Kings County reported that a computer search indicated that at least 147 state decisions had discussed or cited the Halper rule. District Attorney of Kings County v. ladarola, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995). These challenges to states' civil and criminal proceedings are increasing at an alarming rate." The doctrine described by this Court in Halper, 490 U.S. at 449, as only for the "rare case" has become the claim for the ordinary case.

Most of these challenges, even when accepted at the trial level, have been rejected by state appellate courts. For the most part, the states have avoided a categorical approach to the question of civil sanctions, instead considering the particular sanction involved and restricting a finding of double jeopardy to the "rare case." Moreover, the state courts have looked to see if a civil sanction may "fairly be characterized as remedial" rather than finding punishment whenever there is any deterrent or retributive effect or goal." Nevertheless, the temporal and monetary resources devoted to defending the state's authority to pursue its legitimate civil and criminal goals has been crippling. Many states allow an interlocutory appeal when a claim of double

We do not read the Supreme Court cases as requiring an inflexible test which automatically classifies a sanction as punishment unless it can fairly be said solely to serve a remedial purpose. . . The Court [in Kurth Ranch] clearly recognized that civil sanctions may have some incidental deterrent or punitive effect without necessarily being 'punishment' for double jeopardy purposes. Although the Halper Court at one point employed somewhat expansive language ('fairly said solely to serve a remedial purpose'). . . that language does not comprise the holding or the test established in Halper and in subsequent cases. . . . Id. at 874) (emphasis in original);

See also State v. Tench, 462 S.E.2d 922, 924 n.4 (Va. Ct. App. 1995) ("This is not the 'rare case' described by Halper. The sanction here is not monetary and is not designed to compensate the government for out-of-pocket losses. Its remedial purpose is not to compensate, but to protect the public from intoxicated drivers and the accidents they cause.").

Another source of potentially crippling litigation is habeas corpus claims of state prisoners in both state and federal courts seeking to vacate criminal convictions due to prior civil sanctions.

¹⁹ See, e.g., People v. Dvorak, 658 N.E.2d 869 (Ill. App. Ct. 1995) (upholding denial of motion to dismiss DUI prosecution, and stating:

jeopardy is asserted to bar a criminal prosecution.²⁰ Thus, the orderly process of justice is delayed even when the double jeopardy claims are ultimately rejected.

If the Court affirms the courts below, this drain on state judicial resources would multiply dramatically. It would be virtually impossible to find any civil sanction "solely" remedial, as all such sanctions have some deterrent or retributive effect or goal. The violent prisoner would escape prosecution for his crimes based on the same erroneous analysis that caused the Ninth and Sixth Circuits to bar both forfeiture and prosecution. Instead, double jeopardy principles should return to the intent of this Court's decision in Halper and be applied extremely narrowly in the civil sanction area. This Court's decision must be carefully crafted to avoid disastrous and unintended results to the states' authorized civil sanctioning power.

C. Contrary To The Decisions Below, Under This Court's Double Jeopardy Doctrine as Enunciated in Halper and Kurth Ranch, Forfeitures Are Punishment Only In The "Rare Case."

Part B, supra, demonstrates how an erroneously expansive reading of Halper is having a deleterious effect on an array of civil sanctions. The most immediate negative effect of the decisions of the courts below is on the forfeiture

sanction. The courts below held that civil forfeitures, categorically, are "punishment" for purposes of applying the Double Jeopardy Clause. This directly conflicts with Halper's holding that civil sanctions are "punishment" only in the rare case. Moreover, this court in Austin recognized that some types of forfeiture are remedial and thus fall outside the Double Jeopardy Clause.

The courts below also neglected to assess the particular remedial purposes of forfeiture actions. The fine in *Halper* was intended to compensate the government for its direct losses and expenses incurred as a result of the false claims filed by Halper and the ensuing litigation. In the case of forfeiture, there are costs to society resulting from illegal drug marketing that are not assessable in financial terms, but are nonetheless real.²¹ And the remedial goal is to remove the harmful assets from society to prevent future damage. Moreover, the illegal narcotics industry is an entire underground economy in which no one acts alone. Every

²⁰ See, e.g., State v. Davis, 903 P.2d 940 (Utah Ct. App. 1995) (interlocutory appeal from denial of motion to dismiss criminal prosecution following forfeiture of vehicle); State v. Aparo, 614 A.2d 401, 403 n.4 (Conn. 1992), cert. denied, 507 U.S. 972 (1993) (double jeopardy claim exception to final judgment rule for appellate review, citing Abney v. United States, 431 U.S. 651 (1977)).

²¹ Many states, recognizing the nature of these costs, have statutorily allocated the proceeds of civil forfeiture actions to remedial compensatory goals such as funding drug law enforcement, drug abuse education and gang prevention programs. See, e.g., Conn. Gen. Stat. § 54-36i(c) (1994) (allocating forfeiture of drug assets to fund of which 70% goes to local and state police for drug education and detection and investigation of drug crime and gang violence, 20% to the department of health for substance abuse treatment and education, and 10% for the prosecution of drug related crimes by the division of criminal justice); Or. Rev. Stat. tit. 16, ch. 166, § 10(1)(c) (1993) (allocating funds to enforcement of drug laws, drug intervention, treatment and education programs and prohibiting use for construction, expansion or maintenance of buildings and employment positions previously funded out of non-forfeiture proceeds); Ariz. Rev. Stat. Ann. §§ 13-4311(I),(N) (1995) (allocating forfeiture proceeds as a first priority to compensate the victim of the crime with which the property was associated).

participant is tied to others in the enterprise. The costs of investigating and prosecuting an individual defendant will inevitably include costs attributable to investigation and prosecution of many others as well. Therefore, it is fair to view broadly the costs of the drug business in assessing the remedial nature of civil forfeiture.

Forfeiture of proceeds of a crime is always remedial.

In Austin, the Court recognized that forfeiture of contraband is remedial. The Court cited United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), where contraband was forfeited, as an example of cases where the forfeiture could properly be "characterized as remedial because it removes dangerous or illegal items from society." Austin, 113 S. Ct at 2811. Proceeds of criminal activity, often of illegal narcotics trafficking, are the functional equivalent of the contraband they replace. Forfeiture of criminal proceeds serves to remove the illegally obtained assets from society and to prevent their reinvestment in the expansion of harmful, illegal activity. Thus, forfeiture of proceeds is remedial under Austin, because it does in fact remove dangerous items from society. Id. at 2811.2

Furthermore, forfeiture of proceeds, like that of contraband, takes property to which the possessor has no lawful right. In Caplin & Drysdale v. United States, 491 U.S. 617 (1989), this Court upheld the forfeiture of proceeds of drug trafficking intended to pay for a criminal defendant's legal fees. The Court reasoned that the money was not rightfully the defendant's, and, therefore, forfeiture did not violate his Sixth Amendment right to counsel of his choice. 2 Cf. Rex Trailer Co. v. United States, 350 U.S. 148, 153-54, n.6 (1956) (illegal proceeds from fraudulent transaction with the government characterized as "unjust enrichment"). Similarly, the forfeiture of assets which do not legally belong to the possessor is not punishment. It merely places the offender back in the position he enjoyed prior to his criminal activities. Moreover, the forfeiture of drug proceeds will always be proportional to the amount of drugs sold, and therefore proportional also to the harm to society. United States v. Tilley, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994).

Although the Ninth Circuit failed to understand the remedial nature of proceeds forfeiture, the same mistake was not made by other circuit courts and many state courts. See, e.g., United States v. Tilley, 18 F.3d 295; United States v. \$184,505.01 in United States Currency, 72 F.3d 1160 (3d Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) (proceeds forfeiture not punishment for

In general, this Court has upheld against double jeopardy challenges the imposition of criminal punishment and the in rem forfeiture of property associated with the crime. See One Lot of Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Various Items of Personal Property v. United States, 282 U.S. 577 (1931); But see Coffey v. United States, 116 U.S. 436 (1886) (striking down forfeiture following acquittal of crime on grounds difficult to determine but appearing to be collateral estoppel principles, with no specific mention of the Double Jeopardy Clause). Coffey was disapproved in

United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

²⁰ The proceeds of criminal activity are analogous to the money taken in a bank robbery. Caplin & Drysdale, 491 U.S. at 626. It would be absurd to find that forfeiture of the proceeds of bank robbery bars a criminal prosecution or vice versa.

purposes of the Eighth Amendment Excessive Fines Clause); District Attorney of Kings County v. Iadarola, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995); Idaho Dep't. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County, 885 P.2d 381, 383 n.5 (Idaho 1994). Those courts correctly held that forfeiture of proceeds is not punishment. As the Fifth Circuit stated:

When the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. . . . The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, continued possession of such proceeds because they have their very genesis in illegal activity.

Tilley, 18 F.3d at 300. See also SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (ordering a previously convicted defendant to disgorge profits of illegal securities activities not punishment for double jeopardy purposes). But see United States v. 9844 South Titan Ct., Unit 9, Littleton, Colo., Nos. 94-1285, 94-1290, 1996 U.S. App. LEXIS 1559 (10th Cir. Feb. 5, 1996) (agreeing with the Ninth Circuit's holding that forfeiture of proceeds is punishment for double jeopardy purposes).

The forfeiture of property which facilitates criminal activity is also remedial.

Forfeiture of criminal instrumentalities protects the public from continued crime by diminishing its profits and providing obstacles to its pursuit. For example, when a drug dealer's car is forfeited, he has to find other transportation. Walking or using public transit makes transporting drugs less flexible, more time-consuming and less secure. Without the property necessary to conduct his business, including buildings and conveyances, the manufacturer or distributor of illegal drugs will have difficulty remaining in business and society will be spared the harm inflicted by this crime. The remedial purpose is not to compensate the government for its litigation costs as was the case for the fine in Halper; rather, forfeiture of instrumentalities serves the remedial purpose of removing the tools of the drug dealer's trade. United States v. Cullen, 979 F.2d 992, 994 (4th Cir. 1992); State v. Rosenfeld, 540 N.W.2d 915, 921 (Minn. Ct. App. 1995); See also One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972) (non-contraband property forfeitable as instruments of a customs offense, and analyzed as liquidated damages).

This is true irrespective of the value of the forfeited facilitating property. Considering that value as an indication of disproportionality and punishment, as was suggested in Austin, is illogical in the double jeopardy assessment. To do so would reward those drug merchants who are successful, and have thus created enormous harm to society, by barring under double jeopardy doctrine a criminal prosecution. On the other hand, small-time or unsuccessful drug dealers who have not managed to amass wealth would be subject to both

forfeiture and prosecution. That distinction makes no sense. See Cullen, 979 F.2d at 995 ("So far as the public welfare is concerned, the Ferrarri is at least as harmful an instrumentality as the Chevette"). Rather, it is the nexus between the property and the crime which is the appropriate consideration. Austin, 113 S. Ct. at 2815 (Scalia, J., concurring in part, concurring in the judgment). If property is sufficiently involved in crime, its removal from that use is remedial.

D. This Court Should Reconsider Halper's Double Jeopardy Application To Civil Sanctions.

As discussed, the two cases on review can be reversed in accord with the actual holdings of *Halper* and *Kurth Ranch*. However, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted the *Halper* doctrine, the amici states believe that that doctrine should be reconsidered and overruled. Such an expanded view of double jeopardy does not comport with the constitutional purposes of the provision. And that expanded analysis, if adopted by this Court, would continue to engender overwhelming litigation in state courts and crippling obstacles to state administration of civil and criminal justice.

The core concern of the Double Jeopardy Clause is the finality of criminal judgments and the prevention of abusive repeated prosecutions for the same offense. Crist v. Bretz, 437 U.S. 28, 33, 35 (1978); Mitchell, 303 U.S. at

399; Breed, 421 U.S. at 528.²⁴ The multiple punishment prong, at least in the context of a single trial, does no more than ensure that any punishment imposed does not exceed that authorized by the legislature. Missouri v. Hunter, 459 U.S. 359, 368-369 (1983). Those concerns are not furthered by the expanded Halper analysis employed by the Ninth and Sixth Circuits. By rejecting the legislatively authorized cumulative civil and criminal penalties for certain misconduct, that doctrine actually conflicts with that strain of prior double jeopardy jurisprudence. In fact, it creates an unwarranted shift in the balance of power between the legislative and judicial branches by substituting the trial court's judgment for the legislature's as to the appropriate sanction for misconduct.

Although addressing only the multiple punishment prong, Halper, when read as the Sixth and Ninth Circuits did, in fact creates a concept of "successive punishments" applied to civil actions. That concept does not address potential abuse of the criminal process through successive

²⁴ Prior to Halper, it had been well settled that a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause. Helvering v. Mitchell, 303 U.S. 391, 399 (1938). Before Halper, therefore, the Court had considered a civil sanction in the context of determining if a statutory scheme was in fact a criminal proceeding requiring all of the constitutional protections accorded criminal defendants, despite a legislative label indicating it was intended to be a civil proceeding. The determination was done through statutory construction, and deference was paid to the legislature's denomination. Only the clearest proof that the purpose and effect of the sanction were punitive would suffice to override the legislature's manifest preference for a civil penalty. United States v. Ward, 448 U.S. 242, 249 (1980).

trials. The Halper decision does not bar a civil action following a criminal prosecution; it merely bars any portion of a civil penalty imposed that is deemed greater than that which would be remedial. Thus, the Court did not preclude a second trial, nor did it require the civil action to provide the constitutional safeguards of the Sixth Amendment and other provisions relating to criminal defendants. It is evident therefore that the Court was not furthering the successive prosecution concern of the Double Jeopardy Clause.²⁵

The amici states therefore urge this Court to end the confusion in Double Jeopardy jurisprudence created by lower courts' attempts to deal with the aftermath of Halper and Kurth Ranch. The principles enunciated in prior cases for determining if a statutory scheme is in fact punitive provides for the rare case where a legislature has created what is really a criminal process but has denominated it civil. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); United States v. Ward, 448 U.S. 242 (1980). Returning to those

principles will stem the tide of onerous, but meritless, double jeopardy litigation that *Halper* has unnecessarily created.

CONCLUSION

For the reasons set forth herein, the decisions of the Courts of Appeal for the Ninth and Sixth Circuits should be reversed.

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²⁵ It is worth noting that the remedy proposed by the Ninth Circuit for the federal system, i.e. using criminal forfeiture and combining if with the criminal prosecution in one action, will not necessarily work in the states. Many states do not have a criminal forfeiture procedure and cannot combine the civil forfeiture action with the criminal prosecution. Instead, those states will have to forego either the forfeiture action or the criminal prosecution if the analysis in the federal cases below is affirmed. Moreover in many states the civil forfeiture statutes require short time periods for adjudication after seizure. E.g., Conn. Gen. Stat. § 54-36h(b) (1994) (forfeiture petition must be filed within 90 days of seizure and a hearing must be held promptly). Thus, it could often be the criminal prosecution which will be barred under the Sixth Circuit approach. That approach also provides an incentive for large scale criminal defendants to concede forfeiture cases quickly in order to avoid lengthy prison terms. See People v. Hellis, 536 N.W.2d 587, 592 (Mich. Ct. App.), appeal denied, 539 N.W.2d 504 (Mich. 1995).



No. 95-345; 95-346

In The Supreme Court of the United States October Term, 1995

No. 95-345
UNITED STATES OF AMERICA, Petitioner,
vs.
GUY JEROME URSERY, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 95-346
UNITED STATES OF AMERICA, Petitioner,
vs.
\$405,089.23, ET AL., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE
OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC., AND
THE NATIONAL SHERIFFS' ASSOCIATION
IN SUPPORT OF THE PETITIONER.

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THE NATIONAL SHERIFFS' ASSOCIATION
IN SUPPORT OF THE PETITIONER.

MOTION OF AMICI CURIAE TO FILE BRIEF AND BRIEF.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. Consent to file has not been

received from Counsel for the Respondents. The letter of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Come now Americans for Effective Law Enforcement, Inc., the International Association of Chiefs of Police, Inc., and the National Sheriffs' Association, and move this Court for leave to file the attached brief as amici curiae, and declare as follows:

 Identity and Interest of Amici Curiae. The amici curiae are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit educational organization that conducts legal research and provides law bulletins and continuing legal education programs for law enforcement administrators and their counsel.

AELE has appeared before this Court as amicus curiae more than one hundred times and many times in other federal and state appellate courts. Its amicus program seeks to establish a body of law that enhances the effectiveness of law enforcement agencies, in a constitutional manner. AELE typically appears in support of a government agency or official. However, when the facts so warrant, AELE will decline to appear in a case or will support the opposition (as it did in Hudson v. McMillian, 112 S. Ct. 995 (1992)).

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 82 nations. Through its programs of training, publications, legislative reform, and amicus curiae advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens. The IACP has a Narcotics and Dangerous Drugs Committee, comprised of 30 association members who represent federal,

state, and local law enforcement agencies concerned with drug interdiction activities. The responsibility of this committee is to ensure cooperation between agencies at these various levels, as well as internationally.

The IACP, through its membership and staff, has assisted the Department of Justice (DOJ) over the last two years with the development of a teaching curriculum to instruct state and local law enforcement officers in the permissible and proper use of the federal asset forfeiture statutes as a tool in combating illegal drug activities. The IACP is also a member of the Working Group on Asset Forfeiture, established by the Deputy Attorney General of the United States. The Working Group has been investigating proposed reforms to the federal asset forfeiture legislation and the DOJ's Administrative Guidelines.

The Association has consistently advocated that asset forfeiture is the single most effective tool available to law enforcement in the national effort to disrupt and then stop illegal drug activities. Since 1987, the IACP has endorsed asset forfeiture programs at the state and federal level, and has called upon the various governmental units to enact such legislation to combat illicit drug trafficking.

The IACP believes that criminal enterprises, as a matter of law, have no legal claim to the proceeds of their illegal activities, and to redirect those captured proceeds or instrumentalities is, therefore, not an additional punishment or deprivation of legally owned property, and wishes to explain the basis for its beliefs with the accompanying amici curiae brief.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. Along with its interest in the effective admin-

istration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

2. Desirability of an Amici Curiae Brief. Amici are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of administering procedures involving forfeiture actions; and (2) police legal advisors who are called upon to advise law enforcement officers and administrators in connection with such matters.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel at the state and national level—we are particularly aware of the impact of the ruling of the courts below. We respectfully ask this Court to consider this information in reaching its decision in these consolidated cases.

- 3. Reasons for Believing that Existing Briefs May Not Present All Issues. AELE, IACP, and NSA are state and national associations, and our perspective is broad. This brief concentrates on policy issues, including the importance of asset forfeiture proceedings in effectively dealing with the problem of illicit drugs in our various jurisdictions. Although petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.
- 4. Avoidance of Duplication. Counsel for amici curiae has reviewed the facts of this case and has conferred with counsel for petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

 Consent of Parties or Requests Therefor. Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This motion is necessary because the Respondents have not granted consent to amici.

For these reasons, the amici curiae request that they be granted leave to file the attached amici curiae brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

See Section on Identity and Interest of Amici Curiae, supra.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A CRIMINAL PROSECUTION BECAUSE THE GOVERNMENT HAS OBTAINED A CONSENT JUDG-MENT IN A RELATED CIVIL ACTION. THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A CIVIL FORFEITURE PROCEEDING IN A CASE IN WHICH THE PROPERTY OWNERS ALSO ARE PROSECUTED FOR NARCOTICS AND MONEY LAUNDERING OFFENSES.

The courts below, United States v. Ursery, 59 F.3d 568 (6th Cir. 1995) and United States v. \$405,089.23, Et Al, 33 F.3d 1210 (9th Cir. 1995), ruled that the Fifth Amendment Double Jeopardy Clause bars prosecutions of drug defendants whose property was subjected to civil forfeiture actions. In effect, these courts have held that civil forfeiture of property used to facilitate criminal activities, or that constitute the proceeds of criminal activity, necessarily constitutes "punishment" under the Double Jeopardy Clause. In so holding the courts departed from this Court's preference expressed in United States v. Halper, 490 U.S. 435 (1989), for a case-by-case approach to the issue of whether a particular civil sanction inflicts punishment.

These decisions will have enormous practical consequences for law enforcement in America. A categorical conclusion that all civil forfeitures constitute punishment will have the effect of completely barring a later criminal prosecution of the owner, even if the particular prior civil forfeiture were fairly characterized as substantially remedial within the purview of Austin v. United States, 113 S. Ct. 2801 (1993). It will dramatically alter the common practice of pursuing both forfeiture of offending

property as a civil remedy and punishment of its owner as a criminal remedy. In effect, it will end forfeiture of drug proceeds in America as it presently exists and adversely impact the efforts of prosecutors to file criminal charges. *Amici* submit that a proper application of double jeopardy principles does not support such a rule.

Prosecutors and law enforcement administrators will justifiably be reluctant to commence, prosecute, or settle civil forfeiture actions if by so doing it necessarily precludes the prosecution of serious criminal offenses. The decisions below will also engender literally thousands of motions to dismiss indictments, post-trial motions for relief, and collateral attacks on existing judgments, and will add substantial delay to the adjudication of defendants' guilt and require burdensome post-trial litigation over what should be final criminal convictions.

Amici know from our experience as professional organizations representing law enforcement authorities at all levels below the federal government, that such a result will not only impair our effort to stem the tide of the drug epidemic in America, but that it will also have a devastating financial impact on law enforcement at all levels of government.

The Office of the United States Attorney General has reported that revenue produced from forfeitures is "an invaluable source of funding" that is reinvested into federal, state, local and international law enforcement efforts to fight the war against crime. "In an austere budget environment," the Office notes, "the [federal] Assets Forfeiture Fund has provided law enforcement with critical resources to fight the war against crime." Annual Report of the Dept. of Justice Asset Forfeiture Program, F.Y. 1993 at 17-18.

Since 1985, more than \$3.8 billion in illicit cash and proceeds from the sale of property have been deposited into the Fund. Almost \$1.4 billion has been shared with state and local

law enforcement efforts. The Justice Department also shares drug seizure funds with foreign countries that assist United States law enforcement activities. Annual Report of the Dept. of Justice Asset Forfeiture Program, F.Y. 1994 at 18-20. This sharing arrangement is vital to securing much-needed cooperation of foreign governments.

More importantly, unless the assets of a drug trafficking operation are seized, those persons who are convicted will be replaced continually, as needed. As noted in one case, "...forfeitures are not punishment for criminal activity, but rather an exercise of the police power of a state to confiscate property that was instrumental in a crime so as to prevent the continuance of unlawful acts." *United States v. Jenison*, 484 F.Supp. 747, 753 (D.R.I. 1980).

Amici strongly believe that the presently utilized forfeiture procedures and programs fully protect the legitimate property interests of innocent parties; nor would we support a program that failed to do so. Moreover, present state and federal procedures and programs do not involve an abuse of power. To the contrary, they scrupulously safeguard the legitimate interests of the innocent. We respectfully urge, therefore, that this Court maintain the settled constitutional principles upon this subject. It should not foreclose what undoubtedly constitutes the most effective effort yet devised to diminish the epidemic of illicit dangerous drugs in our communities.

CONCLUSION

Amici urge this Court to affirm the decision of the courts below on the basis of the precedents of this Court and sound judicial policy.

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Nos. 95-346 and 95-345

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FEB 29 1996

In The

CLERK

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October Term, 1995

UNITED STATES OF AMERICA.

Petitioner,

V.

GUY JEROME URSERY,

Respondent.

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UNITED STATES OF AMERICA.

Petitioner,

V.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth And Ninth Circuits

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INTEREST OF AMICI CURIAE

Virtually every state has authorized civil forfeitures and penalties to help combat the growing problem of crimes motivated by greed. These civil remedies are intended to remove the incentive for drug dealers, money launderers, perpetrators of securities fraud, and other organized criminals to engage in their illicit trades. Unlike the street corner crack dealer, major drug dealers are motivated by greed, not by their own addictions. They live, usually very well, off the weaknesses, the ignorance, the youth, the misfortunes of others.¹

Before legislatures authorized civil forfeitures, these criminals would "do their time," then retire on their spoils, or use them to finance their re-entry into their illegal businesses. Forfeitures were intended to remove the economic power base of these criminals, and to hit them where it would hurt most: in their pocketbooks.²

Washington, like many states, applies federal double jeopardy interpretation to its state constitution's double jeopardy provision. State v. Gocken, 127 Wash. 2d 95, 107, ____ P.2d ___ (1995) (holding that Washington's double

¹ One of the cases below, United States v. \$405,089.23 in United States Currency, No. 95-346, 33 F.3d 1210, 1214 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995) shows just how well these dealers live. There, the government sought to forfeit, as proceeds of drug trafficking and money laundering, over \$500,000, 138 silver bars, a helicopter, two boats, a plane and eleven cars.

² See e.g., Omnibus Drug Act, Ch. 271 § 211, 1989 Wash. Laws 905.

jeopardy clause is "given the same interpretation the Supreme Court gives to the Fifth Amendment.")

This Court's opinions relating to double jeopardy in United States v. Halper, 490 U.S. 435 (1989), Austin v. United States, 113 S.Ct. 2801 (1993), and Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994), have confused the lower courts about double jeopardy in the context of parallel civil and criminal actions. The result is chaos.³

Some courts have concluded that crimes and related civil forfeitures are almost always the same offense. See, 9844 South Titan Court, supra. United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), United States v. Perez, 70 F.3d 345 (5th Cir. 1995), Oakes v. United States, 872 F. Supp. 817 (E.D. Wash. 1994). Others say that they are never the same offense. See, United States v. Falkowski, ___ F. Supp. ___, 1995 WL 568524 (D. Alaska Sept. 25, 1995).

Washington courts rely on this Court for federal constitutional interpretation, and understandably are reluctant to decide double jeopardy issues in forfeiture cases before this Court has ruled on them. Although the Washington Supreme Court recently held that forfeiture of proceeds of drug sales is not punishment, the divided court deferred consideration of whether or not forfeiture of property used to facilitate a crime is or can be the same offense as the crime. State v. Cole, 128 Wash. 2d 262, _____ P.2d ____ (1995), motion for reconsideration pending.

Unlike the federal government, many states, including Washington, have no criminal forfeiture provisions. Forfeitures are civil administrative or judicial proceedings conducted parallel to a criminal prosecution. Therefore this Court's decisions in the cases at bar will fundamentally affect how the states use civil forfeiture laws, and what kinds of laws legislatures will enact in the future.

Prosecutors and law enforcement agencies thus have a strong interest in how this Court decides whether and how double jeopardy applies to parallel civil and criminal proceedings. They want to be able to use the tools provided by their legislatures to remove the incentives for organized or extremely profitable criminal activity, and they want to do so in a way that does not infringe on fundamental rights.

³ For example, some courts apply Halper's rational relation test and find that double jeopardy does not bar a second punishment. See e.g., SEC v. O'Hagan, __ F. Supp. ___, 1995 WL 605986 (D. Minn. Aug. 8, 1995) (Halper, not Austin, determines whether forfeiture is remedial or punitive); Ragin v. United States, 893 F. Supp. 570 (W.D.N.C. 1995) (forfeiture of drug proceeds is not punishment because it is remedial under Halper and because defendant was never legally entitled to the property); United States v. Ogbuehi, 897 F. Supp. 887 (E.D. Pa. 1995) (forfeiture of \$96,000 worth of property was rationally related, under Halper, to costs to government and society resulting from defendant's heroin distribution); United States v. Box, __ F. Supp. __, 1995 WL 617477 (N. D. Ill Oct. 10, 1995) (applying Halper rational relation test). Some, like the courts below, say or imply that Austin effectively overruled Halper, and find that double jeopardy bars a second sanction, regardless of its remedial nature. See also United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, et al., 1996 WL 49002 (10th Cir. Feb. 5, 1996)

SUMMARY OF ARGUMENT⁴

In 1965 the "fictions and rationalizationss" that complicated double jeopardy law were described as the "characteristic signs of doctrinal senility." Nhote, Twice In Jeopardy, 75 Yale L.J. 262, 264 (1965). Because of the confusion caused by Halper, Austin, and Kurth Rannch, the "fictions and rationalizations" have multiplied exponentially, and "doctrinal senility" is no longer just an amusing description of disarray. It has arrived, like ssenility, erasing the memory of what double jeopardy was meant to be.

The Double Jeopardy Clause of the Fifth Amendment provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life our limb." The lower federal courts and the state courtss are deeply divided on what constitutes the same offensse, what constitutes jeopardy, and other aspects of current double jeopardy analysis that arose only after Halperr, Austin, and Kurth Ranch.5

Justice Frankfurter anticipated this predicament in his thoughtful concurring opinion in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). He recognized that a court's judgment whether civil penalties and forfeitures are punitive or remedial would be speculative. *Id.* at 554. He said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings, and that such actions were common at the time the Fifth Amendment was ratified. *Id.* at 555-56.

If double jeopardy was not meant to bar multiple punishments that were authorized by Congress, how can citizens be protected from oppression by multiple or excessive punishments? Justice Frankfurter relied on the Eighth Amendment. *Id.* at 556.

As Justice Frankfurter observed, a careful examination of the historical background and legal development of double jeopardy leads to the conclusion that double jeopardy was never meant to restrict the authority of Congress or legislatures to determine what punishments to impose for particular conduct. This Court's jurisprudence, from Ex Parte Lange, 85 U.S. (Wall) 163 in 1874 until Halper in 1989, consistently gave great deference to legislative intent in the realm of punishments.

⁴ Portions of this brief were adapted from Barrbara A. Mack, Double Jeopardy: Civil Forfeiture and Criminal Punnishment - Who Determines What Punishments Fit The Crime?, 19 Secattle U. L. Rev. (forthcoming April, 1996).

⁵ For example, one of the questions beforee this court is whether the parallel civil and criminal proceedings in the courts below constituted, in each case, a single prroceeding for purposes of double jeopardy analysis. Beforee Halper this question would not have arisen.

Halper quoted Missouri v. Hunter, 459 U.S. 3599, 368-69 (1983) to say that cumulative punishment authorized bby Congress is permissible in a single trial. But Hunter was a siringle trial case, and two proceedings were not an issue. Halpeer's use of the

quotation expanded its meaning, and after Halper, lower courts have gone much further. See e.g., United States v. Millan, 2 F.3d-17 (2d Cir. 1993). Yet there is no analysis or holding by this Court that supports the concept that cumulative punishments are permissible only in a single proceeding. Halper's use of this phrase has also led courts to confuse the multiple prosecution and multiple punishment prongs of double jeopardy analysis. See e.g., 9844 South Titan Court, supra.

This Court should adopt Justice Frankfurter's reasoning. The Double Jeopardy Clause is too blunt an instrument to deal with these cases, and the multiple punishments prong of double jeopardy law is not grounded in the history of the Fifth Amendment or in the cases it supposedly arises from. Instead the Court should employ the more direct and precise Eighth Amendment to curb government overreaching. This will protect criminal defendants and civil claimants without trammeling the well-recognized right of the legislature to determine what, and how many punishments fit a particular crime.

ARGUMENT

- I. DOUBLE JEOPARDY WAS NEVER MEANT TO LIMIT THE AUTHORITY OF THE LEGISLATURE TO DETERMINE PUNISHMENT, INCLUDING MULTIPLE PUNISHMENTS.
 - A. Nothing In English Common Law, Colonial History, Or Development Of The Fifth Amendment Indicates That Double Jeopardy Was Intended To Limit The Authority Of Legislatures To Determine Punishment.

The statutory roots of double jeopardy are unclear. Neither the Magna Carta nor the English Bill of Rights of 1689 mentions double jeopardy protection, although both contain many other antecedents of our Constitution.6

In the seventeenth and eighteenth centuries Lords Coke and Blackstone clarified double jeopardy in their works describing the common law of England. The common law included the pleas in bar of autrefois convict and autrefois acquit, which barred a second trial after a verdict. See 75 Yale L.J. at 262, n.1. The word "jeopardy," which first appeared in Blackstone, only applied to prior verdicts of guilt or acquittal. Jay A. Sigler, Double Jeopardy; The Development of A Legal And Social Policy 20 (1969). Most criminal penalties then were capital, hence the term "jeopardy of life." By the eighteenth century double jeopardy applied primarily to capital crimes. Sigler, supra at 4-5.

The colony of Massachusetts first codified double jeopardy, applying it not only to all kinds of criminal cases, but to civil cases as well. Sigler, supra at 21. Other colonies adopted Massachusetts' version of the doctrine, but broad double jeopardy protection was short-lived. Id. at 22. After the American Revolution, most states did not incorporate double jeopardy into their constitutions. Id. at 23. New Hampshire was the first state to adopt a Bill of Rights that included double jeopardy: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Id. (quoting N.H. Const. of 1784, art. I, § XVI,

⁶ These antecedents include: the right to petition, free election of members of parliament, the consent of parliament to raise or keep an army in time of peace, free speech within parliament, parliamentary consent to levy taxes, and that

[&]quot;excessive bail ought not to be required, nor cruel and unusual punishments imposed." Robert S. Peck, The Bill of Rights and the Politics of Interpretation, 116 (1992), quoting 1 The Bill of Rights 4 (B. Schwartz ed. 1971) and App. B English Bill of Rights (1989).

^{7 &}quot;Life or limb" may derive from an earlier period when punishments of maiming and mutilation were common, before double jeopardy became largely limited to capital crimes. Sigler, supra, at 5.

reprinted in Perry and Cooper, Sources of Our Liberties, 384 (1959)). New Hampshire's protection, limited to former acquittals, was considerably narrower than that afforded by colonial Massachusetts.

The framers of the Constitution enacted the Bill of Rights in a mere three months, and there was little reported debate about the double jeopardy clause. See 1 Annals of Congress (Joseph Gales, ed., 1834), and Documentary History of the First Federal Congress 1789-1791, Vol. 1, Linda Grant Depauw, ed., 1972, Vol. 4, Charlene Bangs Bickford and Helen E. Veit, eds., 1986.

James Madison's original proposed double jeopardy language said "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Congress at 434, 753. The Senate changed Madison's language to "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." 4 Documentary History of the First Federal Congress, supra at 46.

The early development of the concept of double jeopardy and its codification in the Fifth Amendment do not tell us precisely what evil it was meant to protect against: whether it was meant to limit the discretion of prosecutors, of judges, of the legislature, or of all of them. In early England, when the common law was developing everyone represented the crown, so English common law does not help us discern the intent of the framers of our Constitution. We must look to our own case law for answers. B. Ex Parte Lange, Cited As The Genesis Of The Multiple Punishments Prong Of Double Jeopardy Analysis, Holds Only That A Judge May Not Impose A Sentence Beyond That Authorized By The Legislature.

Ex Parte Lange, 85 U.S. (Wall) 163 (1874) is universally cited as the case that first defined the multiple punishments prong of double jeopardy analysis. But Lange does not stand for that proposition. In Lange the defendant was convicted of stealing U.S. mail bags. The law authorized a fine or imprisonment, but not both. Nevertheless the judge imposed a prison sentence and a two hundred dollar fine. Lange went to jail and paid the fine. Shortly thereafter the court vacated the sentence and imposed a new sentence, this time for prison alone.

The Supreme Court held that vacating the judgment and imposing a different sentence constituted two punishments for the same offense, because once the defendant "had fully suffered one of the alternative punishments to which the law alone subjected him, the power of the court to punish further was gone." Id. at 176.

Implicit in Lange is the only unifying thread in double jeopardy analysis from 1874 until today: the double jeopardy clause does not restrict the legislature's ability to decide how many and what punishments fit the crime. The Lange opinion stands only for the proposition that the trial court may not exceed the punishment authorized by the legislature. The trial court's sentence was illegal. Had Congress authorized both a fine and prison, there would have been no issue for the Court to decide. Deference to

legislative intent became a fundamental part of twentieth century double jeopardy analysis. See, Albernaz v. United States, 450 U.S. 33 (1981); United States v. Whalen, 445 U.S. 684 (1981); Missouri v. Hunter, 459 U.S. 359 (1983).

Unfortunately Lange contains an oft-quoted dictum that is cited as the basis for the double punishment prong of double jeopardy analysis: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense." Lange, supra at 168. To support this broad statement the Court cited only cases that related to second prosecutions after a conviction or acquittal: multiple prosecution, not multiple punishment cases. See, e.g., Cooper v. State, 13 N.J. (1 Green) 361 (1833), Com. v. Olds, 15 Ky. (5 Litt.) 137 (1824), Crenshaw v. Tenn., 8 Tenn. (1 Mart. & Yer.) 122 (1827), cited in Lange at 170-172. In fact it was not the Fifth Amendment, but the common law that served as a basis for the Lange Court's interpretation of the Double Jeopardy Clause: "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." Lange at 170.

Since the common law at the time the Constitution was adopted limited double jeopardy to pleas in bar of autrefois acquit, autrefois convict, former pardon, and autrefois attaint,8 no common law double jeopardy analysis cited by the Court supported its broad dictum. The

Court's decision really was based on due process, so the Court needed no common law basis for its decision. See, Kurth Ranch, supra, at 1956, Scalia, J. dissenting.

Lange was not a unanimous opinion. In his dissenting opinion Justice Clifford emphasized that the Double Jeopardy Clause was only meant to apply to multiple prosecutions. Lange, supra at 201. The disagreement in 1874 frames the question before this Court today: Was double jeopardy ever meant to protect against multiple punishments? Even the Lange majority believed Congress could impose multiple punishments.

Twenty-two years after Lange, the Court directly contradicted its dictum. In United States v. Ball, 163 U.S. 662, 669 (1896), a double prosecution case, the Court said of the Double Jeopardy Clause "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."9

Lange held only that a judge cannot impose more punishment than the legislature authorized. It does not stand for the proposition that Double Jeopardy bars the legislature from authorizing multiple punishments.

⁸ Former pardon and autrefois attaint are obsolete pleas not applicable to our criminal procedure. See, Note, Twice in Jeopardy, 75 Yale L.J. 262, n.1 (1965). Autrefois acquit and autrefois convict only apply to multiple prosecutions.

⁹ The Ball case is infrequently cited, and where it is, it is cited with Lange in support of three-pronged double jeopardy analysis. (See e.g., North Carolina v. Pearce, 395 U.S. 711, 717, nn. 9, 10, 11 (1969)).

C. Between 1789 and 1989 Congress Has Authorized And The Judiciary Has Upheld Multiple Punishments And Penalties For The Same Offense When Intended By Congress.

Our early forfeiture laws, based on the common law, provided for seizure and forfeiture in rem of ships for customs and revenues violations, piracy, and slave trading, partly because foreign owners were frequently out of reach of our courts. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974), and Oliver Wendell Holmes, Jr., The Common Law 28 (Little, Brown & Co. 1923) (1981). Many of these laws provided for parallel criminal prosecution and civil forfeitures. 10

Between the late nineteenth century and today double jeopardy has arisen in the context of parallel civil and criminal proceedings because Congress and legislatures, as they have since the beginning of the republic, have passed additional laws designed to reimburse the government for the costs of criminal activity and to discourage particular kinds of conduct.

> The Court Has Upheld The Legislature's Power To Authorize Multiple Punishments In Criminal Cases For The Same Offense.

In the 1980's the Court examined congressional intent and the multiple punishments prong of double jeopardy analysis in purely criminal cases. In these cases the Court held unequivocally that double jeopardy does not limit the power of Congress and legislatures to impose multiple punishments for the same criminal activity. Therefore in Albernaz v. United States, 450 U.S. 333 (1981), where the defendants were convicted of conspiracy to distribute and of conspiracy to import marijuana, double jeopardy did not bar consecutive sentences because

"the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed . . . [and] Congress intended . . . to impose multiple punishments."

Id. at 344.

In United States v. Whalen, 445 U.S. 684 (1980), a case with four written opinions, all of the opinions agreed that the double jeopardy decision hinged on legislative intent. The majority opinion held that double jeopardy barred the imposition of consecutive sentences for rape and felony murder based on the same offense, because Congress had not intended to impose multiple punishments for

Stat. 174 provided that if goods, entered for exportation, with intent to draw back the duties, were landed in the United States, the goods and the vessels they were in were forfeitable to the government, and all persons involved subject to criminal prosecution. The Act of May 10, 1800, Chap. 51 § 1-4, 2 Stat. 70-71. provided that any person with an interest in a ship used to transport slaves would forfeit twice the value of his interest in the ship and double the value of any slave which may at any time have been transported in the vessel; and any person serving on such a vessel could be criminally convicted. The Act of Mar. 2, 1807, Chap. 22 §§ 1-10, 2 Stat. 426-30 provided for forfeiture of any vessel fitted out for the slave trade, or used to transport slaves, and for criminal punishment of those involved in the slave trade of up to ten years in prison and a \$10,000 fine.

those offenses. Id. at 689. Justice White, concurring, said that the case could have been decided strictly based on statutory construction, not constitutional interpretation. Id. at 696. "Had Congress authorized cumulative punishments, . . . imposition of such sentences would not violate the Constitution." Id. Justice Blackmun, also concurring, said that "[t]he only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more." Id. at 697. Justice Blackmun went on to say that dicta in other cases indicating otherwise had led to confusion among state courts that "have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments" and such dicta should be squarely repudiated. Id. at 698.

Justice Rehnquist, dissenting in Whalen, also commented on the confusion in the realm of double jeopardy and said that "our opinions, . . . are replete with mea culpa's occasioned by shifts in assumptions and emphasis." Id. at 699. Justice Rehnquist concluded that double jeopardy was not implicated, that the decision should rest on statutory interpretation, and that the Court should have deferred to the lower court's analysis of whether consecutive sentences were intended. Id. at 705-714.

In Missouri v. Hunter, 459 U.S. 359 (1983) the Missouri Supreme Court held that consecutive sentences for armed criminal action and robbery convictions constituted multiple punishments for the same offense, and therefore

were barred by double jeopardy. Previously the Missouri Supreme Court had issued a challenge to the Supreme Court:

Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments of the same offense arising out of a single transaction.

Id. at 365, quoting State v. Haggard, 619 S.W.2d 44, 51 (Mo. 1981). In Hunter, the Supreme Court responded "unequivocally," that "where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end. . . . " Hunter, supra at 368-69. The Court held, as originally implied in Lange, that double jeopardy "does no more" than prevent the sentencing court from imposing greater punishment than the legislature intended. Id. at 366. These cases can only mean that Double Jeopardy does not prevent Congress from authorizing multiple punishments, even for the same offense.

 Until Halper The Court Deferred To Congressional Intent To Impose Civil Penalties In Addition To Criminal Punishment.

Prohibition and related tax laws in the 1920's and 1930's spawned a vast increase in double jeopardy cases,

magnifying the confusion surrounding double jeopardy and the punishment issue. The Court decided two cases on the same day in 1931 that reflect that confusion, and that may have later concerned the Court because of their seemingly inconsistent results. Perhaps as a result of such concern, in parallel civil and criminal cases the Court began consistently to use a statutory construction approach to double jeopardy analyzing congressional intent, and asking whether the purpose and effect of the civil sanction were remedial.

The two cases decided on the same day in 1931 were United States v. LaFranca, 282 U.S. 568 (1931) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931). In LaFranca, an in personam action to recover liquor taxes and penalties, the Court concluded that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." 282 U.S. at 575. The LaFranca Court relied on cases that either provided no authority for their own opinions, were cited out of context, or were irrelevant. See e.g., United States v. Chouteau, 102 U.S. 603 (1881).

Although the LaFranca Court never mentioned double jeopardy it did a double jeopardy analysis, concluding that its result was necessary to avoid "doubts" about the constitutionality of the civil penalty statute. 282 U.S. at 576.

In Various Items the government sued in rem to forfeit a distillery, warehouse, and a denaturing plant because the corporation conducted its business with intent to defraud the government of taxes. The corporation and others had been convicted of conspiring to violate the statute based on the same transactions. 282 U.S. at 578-579. The Court found that double jeopardy did not bar the civil forfeiture because it was *in rem*, and that the forfeiture was not part of the punishment for the criminal offense. *Id.* at 581.

The difference between the Court's analyses in LaFranca and Various Items is that one was an in rem forfeiture and one was an in personam tax penalty. The Court never addressed whether either person was punished or prosecuted twice for the same offense. The Court could have followed the approach suggested in 1926 by Justice Holmes in Murphy v. United States, 272 U.S. 630 (1926), which analyzed whether the purpose of a penalty was punitive or remedial, and concluded that double jeopardy did not bar a remedial civil penalty after an acquittal.

The Court later returned to Justice Holmes' analysis. In Helvering v. Mitchell, 303 U.S. 391, 404 (1938) a taxpayer who had been acquitted of income tax evasion was assessed a fifty percent tax penalty. The Court deferred to Congress' intent to provide a "distinctly civil sanction" for the collection of the additional assessment. Id. at 402. In denying Mitchell's double jeopardy claim the Court said that "in the civil enforcement of a remedial sanction there can be no double jeopardy." Id. at 404 (footnote omitted).

The Court continued to follow and expand upon this line of reasoning. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), a third party "informer" initiated a

qui tam action on behalf of the government under the False Claims Act, 31 U.S.C. 231-34 (coodified as amended at 31 U.S.C. 3730 (1994)), against electrical contractors who had been convicted of defraudinng the government through collusive bidding on Public V Works Administration projects. The False Claims Act provided for a \$2000 per offense civil penalty in addition to double damages. The "informer" won a judgment of \$\$203,000 in double damages and \$112,000 as a civil penaltyly for fifty-six violations of the Act. Under the qui tam pprovisions half the amount recovered would be paid to the government. The Court found that the penalty was remedial because its purpose was to make the government whole. Id. at 551-52.

It is Justice Frankfurter's insightfuul concurring opinion, however, that anticipated the cooming debate over double jeopardy. Justice Frankfurter wwould have rejected the double jeopardy plea on different ggrounds. Id. at 553. He thought that the majority's distinctition between punitive and remedial sanctions contained ' "dialectical subtleties" that are "too subtle" wheen the issue is "safeguarding the humane interests" that the double jeopardy clause was designed to protectct. Id. at 554. Justice Frankfurter noted that punitive goals c could be sought in civil proceedings and remedial goals in n criminal proceedings. He deemed "speculative" a ccourt's judgment whether a forfeiture and double damaages constitute an extra penalty or an indemnity for loss. I ld. If that were the issue, he said, the respondents should be allowed to prove that the penalty and damagees were punitive because they exceeded any reasonable e calculation of loss to the government. Id. This, of course, it is exactly what the

Court did some years later in *Halper*, adopting the punitive/remedial test, and remanding for the lower court to determine whether the penalty fairly compensated the government for its costs.

Justice Frankfurter said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings. Id. at 555. Indeed, he said, such actions were common at the time the Fifth Amendment was written, and "[i]t would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." Id. at 556. See supra note 10. Rather, Justice Frankfurter relied on the Eighth Amendment to protect against oppression from cumulative punishments. Id.

After Hess, and until Halper, the Court continued to rely on the reasoning in Mitchell for cases that arose in the context of parallel civil and criminal cases. See Rex Trailer Co. v. United States, 300 U.S. 148 (1956).

In One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) a jewelry dealer was acquitted of smuggling emeralds and a ring into the country without declaring them. The government then sued to forfeit the jewels. The Court held that double jeopardy did not bar the forfeiture, because Congress intended to order both criminal and civil sanctions. Id. at 236-37. In addition, Congress' purpose in authorizing the forfeiture was remedial. Id. at 237.

In United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), a gun dealer, claiming entrapment, was acquitted of dealing in firearms without a license. He raised double jeopardy as a bar to the subsequent parallel civil forfeiture. The Court analyzed Congressional intent and determined that "only the clearest proof" that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." Id. at 365, quoting United States v. Ward, 448 U.S. 242, 249 (1980).

Civil penalties and forfeitures, when intended by Congress, do not fall within the ambit of the Double Jeopardy Clause. To hold otherwise is to overrule all of these cases.

- II. THE EXCESSIVE FINES CLAUSE PROVIDES A PRECISE, FAIR, AND EFFECTIVE WAY TO CURB GOVERNMENT OVERREACHING IN THE REALM OF PUNISHMENT.
 - A. Halper And Austin Have Unleashed The Speculative, Subjective Analyses Predicted By Justice Frankfurter.

Halper and Austin have changed the landscape of Double Jeopardy law. Both cases involved egregious government overreaching. In Halper the government sought a civil penalty of \$130,000 plus double damages and costs, under the False Claims Act, when the total loss to the government was \$585. 490 U.S. at 437. Furthermore the government did not initiate the civil proceeding until the defendant had been sentenced to two years in prison and

fined \$5000. Id. at 438. Halper was a double jeopardy case that should have been an excessive fines case.

Austin sold a small quantity of cocaine to an undercover agent and was sentenced in state court to seven years in prison. The government sought to forfeit his home and auto body shop. The dual sovereignty doctrine barred a double jeopardy claim. Instead, Austin claimed the forfeiture violated the Excessive Fines Clause.

Halper's double jeopardy holding was narrow:

We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-49.

The Halper opinion gave assurances that the Court was not opening the door to speculation and result-oriented analyses, as Justice Frankfurter had feared. It restricted its decision to "a rule for the rare case . . ." where a "fixed penalty provision subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. The Court did not "consider [its] ruling far reaching or disruptive of the Government's need to combat fraud." 490 U.S. at 450.

But there was dicta in Halper, reiterated in Austin, that lower courts have used to open the door. The dicta in Halper said that:

a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.

490 U.S. at 448. This dicta can only have been meant to support Halper's conclusion that punishment was involved and thus, the multiple punishments prong of double jeopardy analysis applied in that case. If the Halper Court had meant that all civil punishment is barred by double jeopardy, it would not have remanded the case for the trial court to determine what part of the penalty was remedial.

The Halper Court mandated a case by case, rather than a categorical approach to double jeopardy, by saying that double jeopardy protection is "intrinsically personal," and its violation can only be identified "by assessing the character of the actual sanctions imposed on the individual by the machinery of state." 490 U.S. at 447. In Kurth Ranch the Court reiterated and reemphasized this approach. 114 S.Ct. at 1944-46. The categorical approach used by the courts below utterly ignores this important teaching of Halper.

The courts below have interpreted Austin to require a categorical approach to double jeopardy. The sweeping result of a categorical approach is that where there are parallel civil and criminal proceedings based on the same offense, whichever judgment is entered later is barred by the former, regardless of legislative intent or the remedial nature of the sanction. This cannot be what the Fifth Amendment was meant to protect against.

Thus, in \$405,089.23, supra the Ninth Circuit found that forfeiture of proceeds following a criminal punishment was barred by double jeopardy, regardless of whether Congress intended multiple punishments and regardless of whether the forfeiture was remedial. Similarly, the Sixth Circuit held in Ursery, supra, that any facilitation forfeiture is punishment, and therefore bars a later criminal conviction, regardless of the intent of Congress, and regardless of whether any of the forfeiture was remedial.

The predicament Justice Frankfurter anticipated has arrived, full force. Result-oriented courts can now base any double jeopardy decision they choose on stare decisis. They can find that a facilitation forfeiture is remedial and not barred, based on Halper, or punitive and barred under Austin. See United States v. Erinkotola, __ F. Supp. __, No. 1995 WL 581240 (N.D.N.Y. Oct. 2, 1995), and Perez, supra. They can find that forfeiture of proceeds is remedial, and therefore not barred, or punitive and barred. See United States v. Tilley, 18 F.3d 295 (5th Cir. 1994), cert. denied, 115 S.Ct. 574 (1994), and \$405,089.23, supra. They can find that a civil and a criminal proceeding are the "same proceeding" under Halper, or that they are not. See United States v. Millan, 2 F.3d 17 (2nd Cir. 1993), and \$405,089.23, supra. They can find that a civil forfeiture and crime are the same offense under United States v. Dixon, 113 S.Ct. 2849 (1993) or that they are not. See Ursery, supra11 and Falkowski, supra.

¹¹ The courts below and others that say a civil penalty or forfeiture and a crime are always the same offense apparently find unpersuasive the opinion in Arizona v. Cook, 115 S.Ct. 44 (1994), where this Court granted certiorari, vacated, and

This muddle is easily avoided by adopting Justice Frankfurter's reasoning in *Hess*, and applying the Excessive Fines Clause to cases where there is a risk of excessive punishment because of civil remedies authorized by Congress. It controls the problem without overturning this Court's long history of deference to legislative intent.

B. Double Jeopardy Is Too Blunt An Instrument, Both Too Broad And Too Narrow To Apply To Civil Penalties And Forfeitures, But The Excessive Fines Clause Is Both Precise And Fair.

Under the categorical approach adopted by the courts below, when double jeopardy is found the second "punishment" is barred. This can lead to perverse and unjust results. Suppose, for example, a man and a woman live together in a house owned by the man, and together they plant, tend, and distribute from a large marijuana growing operation at his house. If the government charges both suspects criminally and seeks to forfeit the house, the man could stall the criminal case, agree to forfeit his house or settle the civil case, and have the criminal case dismissed based on prior "punishment." The woman, having no property to forfeit, could be sent to prison and fined to the maximum extent allowed by law. This would elevate property rights over liberty interests and is unfair on its face. A defendant's wealth should not be the measure of his or her constitutional protections.

remanded for reconsideration in light of Dixon, supra, an Arizona court opinion that had barred a criminal conviction after imposition of a \$150,000 civil penalty for securities fraud.

Under an excessive fines analysis, the total punishment imposed would be the issue. Forfeiture of the house could be partly or completely reversed, but the man would not be treated differently from the woman based simply on his ownership of property.

The Court could accomplish the same result in this hypothetical by returning to *Halper*, and asking whether the forfeiture was remedial. But the question "Was the forfeiture remedial?" is the functional equivalent of "Was there an excessive fine?" This demonstrates that *Halper* was a double jeopardy case that could have been presented to the Court and decided more appropriately as an excessive fines case.

Double jeopardy is also too narrow. It was not available in Austin. Nor would it be available where a fine, forfeiture, and prison sentence are imposed in a single proceeding. The Excessive Fines Clause addresses both cases.

Austin paved the way for this approach by holding that the Excessive Fines Clause applies to civil penalties. There the Court remanded for the lower courts to develop guidelines for excessiveness. The lower courts are doing so. See e.g., United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, 59 F.3d 974 (9th Cir. 1995), United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995), United States v. Alexander, 32 F.3d 1231 (8th Cir. 1994), United States v. Chandler, 36 F.3d 358 (4th Cir. 1994). Using the excessive fines clause is fair, and does not merely protect the propertied from criminal prosecution.

No. 95-346 and 95-345

In the Supreme Court ILED

OF THE United States

OCTOBER TERM, 1995

Supreme Court, U.S.

FEB 23 1996

CLERK

UNITED STATES OF AMERICA, Petitioner.

V.

GUY JEROME URSERY, Respondent, and UNITED STATES OF AMERICA, Petitioner.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, et al., Respondent.

> On Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE COUNTIES OF SAN BERNARDINO. ALAMEDA, SAN JOAQUIN AND KERN, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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No. 95-346 and 95-345

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, Petitioner,

V.

GUY JEROME URSERY, Respondent,

and

UNITED STATES OF AMERICA, Petitioner,

V.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23)
IN UNITED STATES CURRENCY, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE COUNTIES OF SAN BERNARDINO, ALAMEDA, SAN JOAQUIN AND KERN, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

The amici curiae, the District Attorney of San Bernardino County, California, and the Counties identified on the cover, through their respective District Attorneys and deputy district attorneys, respectfully submit this brief pursuant to Rule 37, Section 4, of the RULES of the SUPREME COURT of the UNITED STATES.

STATEMENT OF INTEREST

The Ninth Circuit Court of Appeals set aside the civil forfeiture of drug proceeds as a second "punishment" in violation of the Double Jeopardy Clause finding the defendants had been previously convicted of related criminal charges in a "separate proceeding." Although the court decision examines the federal statute, 21 U.S.C. Section 881(a)(6), the state of California has a comparable statute which is patterned after the federal statute, California Health and Safety Code Section 11470(f). Since federal law is persuasive in California appellate courts interpreting the state asset forfeiture statute, People v. Superior Court (Moraza), 210 Cal.App.3d 592; 258 Cal.Rptr.2d 499 (1989); People v. \$8,921.00 U.S. Currency, 28 Cal.App.4th 1226, 1232, n. 6; 34 Cal.Rptr.2d 210 (1994), California prosecutors have faced numerous challenges to the state asset forfeiture law based on the Ninth Circuit ruling challenged in this appeal.

Civil in rem forfeiture is a vital part of the California law enforcement strategy to strip drug traffickers of their illicit proceeds, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), and to effectuate the remedial purposes of California Health and Safety Code section 11469(j).

United States v. \$405,089.23, 33 F.3d 1210 (9th Cir. 1994), amended 56 F.3d 41 (9th Cir. 1995), cert. granted, (U.S. Jan. 12, 1996) (No. 95-346) and the companion case of United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), cert. granted, (U.S. Jan. 12, 1996) (No. 95-345) question the

constitutionality of separately filed civil in rem proceedings and criminal prosecutions based on the same offense if they are not litigated in the "same proceeding." California Health and Safety Code sections 11470-11495 provide for a civil in rem proceeding which is comparable to the federal civil in rem proceeding found at 21 U.S.C. Section 881. Failure to litigate these cases in a single proceeding has raised challenges to the state forfeiture statute alleging additional violations of the Double Jeopardy Clause.

Finally, the Respondents (Charles Arlt, James Wren, Payback Mines) have filed an appeal from the forfeiture judgment obtained under the California state civil in rem forfeiture law (People v. 1986 Chevrolet Crew Cab Pickup, et al., No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995), in which they are requesting the court to reverse the judgment based on violations of the Double Jeopardy Clause as interpreted by the Court of Appeals in \$405,089.23. A decision on that appeal is still pending and this Court's decision in the present appeal will impact that case as well as California state asset forfeiture law.

SUMMARY OF ARGUMENT

The constitutional issues to be resolved by this Court are of crucial significance to state and local law enforcement entities. The appellate decisions under review have unleashed a deluge of litigation by criminal defendants seeking to dismiss criminal convictions and sentences and claimants attempting to set aside civil forfeiture judgments. The impact has extended far beyond the realm of asset forfeiture litigation and imperils the use of any administrative hearing or civil sanction by the government.

The intent of the Court to curtail government overreaching and abuse of power has been ill-served by application of the Fifth Amendment Double Jeopardy Clause in *United*

The version of the California Health and Safety law applicable on January 1, 1989 through December 31, 1993 is found at Stats. 1988, c. 1492, (A.B. 4162, Katz). The law was subsequently amended on August 19, 1994, effective on January 1, 1994, by Stats. 1994, c. 314 (A.B. 114, Burton).

States v. Halper 490 U.S. 435 (1989), because of the internal inconsistency of the language within the case and the formulation of an imprecise standard of review which is not appropriate for all civil sanctions. The application of Halper and its progeny to parallel criminal and civil cases has cast doubt upon the continued vitality of the use of any civil sanctions by governmental agencies. The prophylactic powers envisioned by the Court are properly addressed by the Eighth Amendment Excessive Fines Clause which is better suited to evaluate and balance the punitive and remedial factors encountered in individual cases.

Relying on language from Austin v. United States, 113 S. Ct. 2801 (1993) the Ninth and Sixth Circuits incorrectly determined that all forfeiture cases are "punitive" for constitutional analysis under the Fifth Amendment. The correct analysis demonstrates that "proceeds" forfeitures are never punishment because they simply part the illicit fruits of crime from those with no lawful interest in them and that "instrumentality" forfeitures are not punitive so the long as they serve "rough remedial justice" and compensate the government for the societal costs and damages incurred on account of the criminal activity.

Finally, in \$405,089.23 and Ursery the appellate courts determined that parallel criminal and civil cases violate the Fifth Amendment unless they are brought in a "single proceeding." The proper holding is that separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments. The conflicting rights and issues inherent in parallel criminal and civil actions cannot be addressed by a single proceeding and would raise serious constitutional questions. Additionally there is no requirement that parallel criminal and civil cases be litigated in a "single proceeding" when they are brought by separate federal and state entities under the "dual sovereign rule."

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS HAS A DETRIMENTAL IMPACT ON CALIFORNIA ASSET FORFEITURE LAW

Since September 1994, when the Ninth Circuit Court of Appeals issued its opinion in \$405,089.23, California state prosecutors have seen a marked increase in double jeopardy litigation.

The main effort has been directed against "parallel" criminal prosecutions and civil in rem forfeiture actions. Attempting to avoid the imposition of criminal penalties, many defendants have brought motions to set aside criminal convictions and incarceration on the basis of a civil forfeiture judgment that was incurred prior to the criminal conviction. Because of \$405,089.23, some of those efforts have been successful and, as in Ursery, criminal convictions have been dismissed and sentences reversed (People v. Marshalek, No. B099586 (Cal. Ct. App. 2nd App. Dist., Div. 6, appeal docketed Feb. 1, 1996); People v. Prince, No. A067920 (Cal. Ct. App., 1st App. Dist., Div. 1, argued Jan. 10, 1996)). Numerous petitions for habeas corpus relief have been filed at all levels of the state judiciary by incarcerated defendants attempting to set aside criminal sentences (e.g., In re Jeffrey Allen Biddinger on Habeas Corpus, No. S049426 (Cal., pet. for review denied Dec. 21, 1995)). Other parties have attacked civil forfeiture judgments based on a prior criminal conviction (e.g., People v. 1986 Chevrolet Crew Cab Pickup, et al., No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995)).

However, the most significant impact of the \$405,089.23 decision is now being observed in areas of criminal prosecution unrelated to drug asset forfeiture. The ability of administrative agencies to hold administrative hearings and

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impose administrative sanctions is severely threatened. Challenges to Department of Motor Vehicle license revocation hearings, Baldwin v. Department of Motor Vehicles, 35 Cal.App.4th 1630; 42 Cal.Rptr. 2d 422 (1995), modified, 36 Cal.App. 4th 545N and prison board disciplinary hearings involving loss of good time credits, United States v. Brown. 59 F.3d 102 (9th Cir. 1995), have already been filed in California. Future attacks are expected to challenge actions by state agencies revoking licenses of medical, legal and education professionals and building contractors, regulating business enterprises such as liquor stores, securities, and insurance companies, and setting industrial occupational safety standards. If any type of administrative action is imposed which could be interpreted as "punishment" under the definition articulated by the Court of Appeals in \$405,089.23, any subsequent criminal prosecution would be barred.

The continued viability of the \$405,089.23 decision could have serious consequences for law enforcement. Currently, state legislatures have empowered prosecutors to utilize civil remedies to combat crime in areas unrelated to narcotic asset forfeiture such as consumer, insurance and welfare fraud, child support, and environmental law. This is deemed appropriate as these are areas that are not effectively controlled by traditional criminal punishment such as incarceration. The rationale of the Ninth Circuit Court of Appeals in \$405,089.23 pertaining to "punishment" and "single proceedings" could prevent prosecutors from utilizing any type of civil sanction to combat these emerging areas of economic crime.

THE COURT SHOULD APPLY THE EIGHTH AMENDMENT TO SEPARATE CIVIL SANCTIONS

The focus of the majority opinions in both United States v. Halper, 490 U.S. 435 (1989) and Department of Revenue of Montana v. Kurth Ranch, 144 S. Ct. 1937 (1994) is the excessiveness of the additional punishment, not the separate civil proceedings under the federal False Claims Act or the state Dangerous Drug Tax Act. Yet it has been the application of the separate-proceeding prong of the Double Jeopardy Clause that seems to have caused most of the present muddle. Irrespective of whether or not there is a viable multiple-punishment prong within the Double Jeopardy Clause, amici counties urge the Court to abandon its application of the Double Jeopardy Clause to separate civil actions in favor of applying solely the developing criteria under the Eighth Amendment Excessive Fines Clause to such actions, whether they are forfeitures, license suspensions, civil fines or any other civil sanction.

It has been twice suggested by members of this Court that the Fifth Amendment Double Jeopardy Clause has been pressed into service unnecessarily to reach a result that could have been reached under the Eighth Amendment. Justice O'Connor stated that the decision in Kurth Ranch was "entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching." Kurth Ranch, 114 S. Ct. at 1955 (O'Connor, J., dissenting). Justice Scalia noted that:

[t]he Excessive Fines Clause — which was rescued from obscurity only after Halper was decided, [citations omitted] — may well support the judgment in Halper. Indeed it may even explain the judgment in Halper, since much of the language of that opinion

suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a "prolific but small-gauge offender" *Halper*, 490 U.S. at 449.

Id. at 1958, n.2 (Scalia, J., dissenting).

Since this Court's decision in Austin v. United States, 113 S. Ct. 2801 (1993), the Circuit Courts have been active in attempting to define the parameters of the Excessive Fines Clause. See e.g. United States v. Certain Real Property Located at 11869 Westshore Dr., 70 F.3d 923 (6th Cir. 1995); United States v. Real Property Located in El Dorado County at 6380 Little Canyon Rd., 59 F.3d 974 (9th Cir. 1995); United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995); United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994); United States v. Meyers, 21 F.3d 826 (8th Cir. 1994), cert. denied, 115 S. Ct. 742 (1995); United States v. RR #1, Box 224, 14 F.3d 864 (3d Cir. 1994); United States v. One Single Family Residence Located at 18755 N. Bay Rd., 13 F.3d 1493 (11th Cir. 1994). While it is still early and, certainly, this Court has yet to speak to the specifics, the contours of the Eighth Amendment test are sufficiently visible to reveal that the same results would have been achieved in Halper and Kurth Ranch through the application of the Eighth Amendment Excessive Fines Clause rather than the Fifth Amendment Double Jeopardy Clause.

With the exception of the Fourth Circuit, which adopted a pure "instrumentality" test in Chandler, 36 F.3d at 365, the Circuit Courts addressing the excessive fines issue have at least recognized as permissible a hybrid test which first utilizes an "instrumentality" test and then applies a "proportionality" analysis to determine the applicability of the Eighth Amendment.

The "instrumentality" test focuses on the "taint" of the property stemming from its unlawful use. As established in Chandler, the court balances the nexus between the offense and the property, the role and culpability of the owner, and the possibility of separating the tainted property from other property. Chandler, 36 F.3d at 365. "Proportionality analysis compares the value of the property to a variety of factors which may include culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm caused to the community." 11869 Westshore Dr., 70 F.3d at 927.

Applying these principles to the Halper and Kurth Ranch facts, it is clear that the same results would have been reached under the Eighth Amendment Excessive Fines Clause as was reached under the Fifth Amendment Double Jeopardy Clause. The civil fine in Halper and the tax lien in Kurth Ranch would have been satisfied out of legitimately acquired assets which had no nexus to the criminal activities of Mr. Halper or the Kurth family. Thus, even under the pure "instrumentality" test adopted by the Fourth Circuit, the civil fine and tax would not have withstood constitutional scrutiny.

The Eighth Amendment Excessive Fines Clause is better suited to evaluate claims of governmental overreaching and abuse of power because it has the flexibility to apply the appropriate test developed by the lower courts as directed in Austin and to either uphold the forfeiture or mitigate any excessiveness by reducing the forfeiture to an amount determined by the court to be justified under the circumstances of the individual case. Real Property Located in El Dorado County, Id. at 59 F.3d at 986; United States v. Bieri, 21 F.3d 819, 824-25 (8th Cir.) cert. denied, 115 S.Ct. 208 (1994); Appeal after remand, 68 F.3d 232 (8th Cir. 1995). By contrast, the only option under the Fifth Amendment Double Jeopardy Clause is the complete dismissal of the

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action determined to be a multiple punishment or successive prosecution.

By utilizing the Eighth Amendment, any excessiveness could be curtailed without creating the legal quagmire resulting from the application of the Double Jeopardy Clause to traditional civil sanctions such as license suspensions, civil forfeitures, consumer fraud, child support, and environmental law; in short, all the areas where legislatures have authorized parallel criminal and civil sanctions.

Ш.

THE COURT SHOULD RECONSIDER ITS DECISION IN UNITED STATES V. HALPER

Three members of this Court have questioned the viability of the Halper decision in the wake of the flood of double jeopardy litigation which that decision engendered. \$405,089.23 and Ursery represent but a modest portion of the plethora of cases which have been litigated in an attempt to resolve the government's use of criminal and civil sanctions in parallel or related proceedings. Since the Ninth and the Sixth Circuits relied in great measure upon the Halper decision, the resolution by this Court of the issues presented in \$405,089.23 and Ursery will of necessity resolve many of the Double Jeopardy issues being litigated in areas outside narcotics asset forfeiture. For this reason, as well as the reasons set forth below, amici counties urge the court to reconsider its decision in Halper.

Of primary concern is the internal inconsistency of the Halper decision. On page 448, the Court states that: "[A] civil sanction that cannot be said solely to serve a remedial

purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448 (emphasis added). Courts have relied upon this language to find that Halper prohibits the imposition of a civil sanction which serves a remedial purpose if it in any way also deters unlawful conduct. Put another way, if the sanction were 90% remedial and 10% retributive, it is punishment for double jeopardy purposes. This is the view taken in \$405,089.23, Ursery and now more recently in United States v. 9844 South Titan Court, 1996 WL 49002 (10th Cir. Feb. 5, 1996).

Returning to Halper, the next sentence in the opinion states: "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution." Halper, 490 U.S. at 448-449 (emphasis added). This language conflicts with the earlier language. Under this rationale a civil sanction would have to be 100% retributive before it would run afoul of the Constitution. Courts have relied upon this language to find that Halper permits the government to impose civil sanctions which can be characterized as partially punitive and partially remedial. See, e.g., United States v. Brown, 59 F.3d 102 (9th Cir. 1995); People v. \$1,930.00 U.S. Currency, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), modified 39 Cal. App. 4th 1210B (1995). This conflict in Halper has created significant problems and should be resolved.

Halper's utilization of a sliding scale to determine when a Double Jeopardy violation occurs also must be reexamined. While examining whether the civil sanction approximates the government's expenses works in the context of the fines imposed in Halper, such a standard is ill-suited to determin-

²Justices Scalia and Thomas in Witte v. United States, 115 S. Ct. 2199 (1995), and Justice O'Connor in Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994).

How, for example, could a court determine if a 30-day administrative suspension of a driver's license for driving under the influence does or does not compensate the government for costs incurred in the prosecution of driving under the influence cases? In another context, assume State A spends more money to fight drug trafficking than State B. If the government seeks to forfeit assets of equal value from drug dealers in State A and B, the forfeiture might pass constitutional muster in State A, but not State B. These are but two examples of the problems created by Halper's use of a sliding scale to determine if a civil sanction violates double jeopardy, all of which illustrates the need for this Court to reexamine the Halper decision.

IV.

CIVIL IN REM FORFEITURE IS REMEDIAL, NOT PUNITIVE, FOR ANALYSIS UNDER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE

The predicate question that must be answered before the constitutional issues can even be broached, is the determination of whether the remedy chosen by the sovereign to protect the public welfare is remedial or punitive. Halper, 490 U.S. at 448-449; Austin, 113 S. Ct. at 2812. As the court stated at Halper, "[t]he relevant teachings of these [double jeopardy] cases is that the Government is entitled to rough remedial justice." Halper, 490 U.S. at 446. However, \$405,089.23 does not even take this first, vital step. If it did, its holding would have been in conformance with the Fifth Circuit. United States v. Tilley, 18 F.3d 295 (5th Cir. 1994). cert. denied, 115 S. Ct. 574 (1994).

Indeed, the court presents the prosecutor with a Hobson's choice: (1) choose the civil remedy and the criminal buys his way out of prison; or (2) choose the criminal remedy and the criminal retains his ill-gotten gains. \$405,089.23, 33 F.3d at 1221. This choice puts the prosecutor on the horns of a dilemma, with society being the ultimate loser.

Pre-Austin criminal forfeiture case law held that proceeds forfeitures were not excessive as they merely removed the illegal fruits of the crime from the defendant. See, United States v. Sarbello, 985 F.2d 716, 723, n.12 (3rd Cir. 1993); United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), cert. denied, Feldman v. United States, 489 U.S. 1030 (1989). As this Court emphasized in Caplin & Drysdale, it is the "restitutionary ends" of proceeds forfeiture and the "strong governmental interest in obtaining full recovery of all forfeitable assets" that was determinative. Caplin & Drysdale, 491 U.S. at 629-631. Even in the Austin decision, Justice Blackmun, in discussing the extent of the excessive fines clause stated: "The Clause prohibits only the imposition of 'excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event." Austin, 113 S. Ct. at 2812, n.14 (emphasis added).

The question that remains unanswered is whether the remedy sought is remedial? If so, how is that determined? For guidance, the intent of the Congress should be considered: "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." The Comprehensive Forfeiture Act represents, above all, Congress's attempt to "strip these offenders and organizations of their economic power." In re Forfeiture of Caplin & Drysdale, 837 F.2d 637 648 (1988); aff'd, Caplin & Drysdale v. United States, 491 U.S. 617 (1989). The

³This language appears to be at odds with the courts summary dismissal of the Government's assertion in Austin, 113 S. Ct. at 2812.

⁴S.Rep. No. 225, 98th Cong., 1st Sess. 1991, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3374.

California legislature has made the same determination. Cal. Health & Safety Code § 11469(j) (West 1994).

Along with the legislature, California courts have long recognized that the goal of forfeiture laws was to strip economic power from drug dealers. People v. Superior Court (Clements), 200 Cal. App. 3d 491, 498; 246 Cal. Rptr. 2d 122 (1988). Indeed, the California courts, when faced with this same issue, found that if there was a rational relationship between the harm occasioned by the criminal conduct and the proportionate value of the property sought to be forfeited, then the forfeiture would be serving a remedial purpose. People v. \$1,930.00 U.S. Currency, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), modified 39 Cal. App. 4th 1210B (1995).

The clear conclusion to be reached is that if the law accomplishes its goal of stripping the economic profits of criminal activity and recapturing the costs of the criminal harm, then the law serves a remedial purpose. The question posed in *Halper* should have been answered in this manner: even if a civil sanction cannot be said to solely serve a remedial purpose, it can still be remedial.

What are the liquidated damages, or remedial goals, owed to society for the criminal harm? In most circumstances, these "costs" are difficult, if not impossible, to calculate. They range from the pain and grief of the spouse of a slain policeman to the medical expenses paid to treat a victim of a drug overdose. Still, some costs are representative and can be used as a measurement of the "rough justice" being sought.

In 1992, the Federal Government spent \$17.423 billion dollars on the criminal justice system.⁵ In 1992, there were

119,843 drug abuse related episodes in the country's emergency rooms. It is estimated that those episodes will increase to 123,317.6 In 1993, seventy police officers lost their lives in the line of duty, three of those while enforcing the drug laws.7 Additionally, in two of California's large urban centers over 70% of those individuals arrested. r all crimes tested positive for drugs.8

There are other, more imprecise, costs that must be considered. These categories of the damage and costs are legion. Consider just two categories for purposes of illustration so that we have a sense of their scope. The first that should be examined is the damage to the health of all these users. The second is the damage and health costs of the unborn/newborn children of pregnant female users. The second is the damage and health costs of the unborn/newborn children of pregnant female users.

Given the high cost of medical treatment today, and the intrinsic damage done to these individual human beings, the harm caused by the criminal conduct is disproportionate to the economic impact on society. To put it another way, rough justice would permit the forfeiting of any drug trafficking related property to recapture these costs to society. Recapturing these costs would not, therefore, be punitive.

³ Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics — 1994, at 2 (1995).

⁶ Id., at 297.

⁷ Id., at 354.

^{*}Id., at 415. (Los Angeles, 77% and San Diego, 78%)

Professor Frank O. Bowman, III, Playing "21" with Narcotics Enforcement, 52 Wash. & Lee L. Rev. 937, 966-967 (1995).

¹⁰Id., citing, Physiopathology of Cannabis, Opiates and Cocaine (G.G. Nahas & C. Latour eds., 1991); Steven R. Belenko, Crack and the Evolution of Anti-Drug Policy, 33-41 (1993).

¹¹Id., citing, Robert E. Peterson, Legalization: The Myth Exposed, in Searching for Alternatives: Drug Control Policy in the United States 324 (Melvin B. Krauss & Edward P. Lazear eds., 1991).

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These costs are the liquidated damages approved in Halper which can be obtained through the civil forfeiture process for the criminal conduct which has visited such harm on society. Since this is the ultimate goal of civil forfeiture, these statutes are clearly remedial, even though from the perspective of the person whose property is being forfeited, they may appear punitive. However, given the rational relationship between the criminal harm and the costs to society, the remedial aspect of the law overshadows any punitive impact, and would not invoke any constitutional protection, such as double jeopardy.

Specifically, as to the forfeiture of proceeds, since \$405,089.23 departs from an established line of federal precedent and misconstrues the definition of punishment set forth in Austin as applied to purely remedial statutes, amici counties urge the court to reject it and to follow the principles summarized in United States v. Alexander: "Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994).

V.

THE CONSTITUTION DOES NOT PROHIBIT THE IMPOSITION OF PARALLEL CIVIL SANCTIONS TO DETER CRIME

In \$405,089.23 the court opined that the government should either include the criminal forfeiture count on the criminal indictment or pursue only the civil forfeiture action. \$405,089.23, 33 F.3d at 1216-1222. This option prevents the government from utilizing the full range of criminal and civil sanctions to deter crime and requires it to elect which sanction it will impose. This unduly limits the power of government to utilize all of its statutory powers to deter crime.

There is no constitutional prohibition against parallel criminal and civil investigations. Securities and Exchange Commission v. Dresser Industries Inc., 628 F.2d 1368 (D.C. Cir. 1980), cert. denied, Dresser Industries v. Securities and Exchange Commission, 449 U.S. 993 (1980). Indeed, this Court has held that the state has a justifiable interest in conducting a concurrent criminal investigation along with a civil action as "[i]t would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial. United States v. Kordel, 397 U.S. 1, 11 (1970). In essence there is no constitutional, statutory or common law rule that bars the simultaneous prosecution of separate civil and criminal actions by different agencies against the same defendant involving the same transaction. The government is entitled to vindicate several interests simultaneously in different forums. Securities & Exchange Commission v. First Financial Group of Texas, 659 F.2d 660, 666-667 (5th Cir. 1981).

The court in \$405,089.23 failed to recognize that criminal forfeiture is only possible when authorized by statute and that not even all federal criminal statutes have criminal forfeiture provisions. The opinion is even more problematic for states like California which do not have criminal narcotic forfeiture statutes. This leaves the state in the position of making a choice between either the criminal punishment or the civil sanction. This limitation on the power of the federal or state government to utilize the full panoply of criminal and civil sanctions is in direct contradiction of the law as stated by this Court in Kordel.

Separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments, *United States v. One*

Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); One Lot of Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972), or they are litigated in the same proceedings. Halper, 490 U.S. at 450; Kurth Ranch, 114 S. Ct. at 1945, 1948. In \$405,089.23 and Ursery, the appellate courts set aside a civil forfeiture and a criminal conviction because the cases were not resolved in the same proceeding.

The appellate courts in \$405,089.23 and Ursery failed to recognize the impracticality of litigating criminal cases and civil actions in a single proceeding. Criminal and civil cases involve completely separate parties and issues. Whereas criminal cases involve the personal culpability of individuals accused of violating the law, civil in rem forfeiture cases focus on the property, its nexus to illegal activity and the property rights of individuals asserting an interest in the property. Frequently, forfeiture actions involve the resolution of the rights of third parties including commercial entities who may have some legitimate legal interest in the property that would preclude forfeiture. The requirement of a literal single proceeding tied to the criminal case will impair and delay the ability of these third parties, who are not criminal defendants, to litigate and resolve their property interests separate from the criminal prosecution to which they have no standing or interest.

These appellate decisions also fail to acknowledge the different governmental interests being pursued between criminal and civil actions. In a criminal action the state is asserting its power to punish an individual whereas in a civil action that state is attempting to obtain remedial relief to vindicate a state interest in the alleged forfeitable property. Requiring the criminal and civil actions to be litigated in the same proceeding would deny the state access to the equitable powers of the civil courts and the use of civil procedures to obtain swift equitable relief.

The conflicting rights and issues inherent in competing criminal and civil actions are ill served by a single proceeding. Indeed, serious constitutional questions are implicated in a single proceeding, including the Fifth Amendment's Self Incrimination Clause and the Sixth Amendment's Rights to Counsel and to Trial by Jury. Civil discovery rules are very broad and may give an unfair advantage in a criminal trial to either the defense or prosecution. Kordel, 397 U.S. at 11-12. How can a court separate criminal and civil discovery rules in the same proceeding? Additionally, where a defendant may have a right to appointed counsel in the criminal action, that same right does not apply to the civil action. United States v. \$100,375.00 in U.S. Currency, 70 F.3d 438 (6th Cir. 1995); United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564 (9th Cir. 1995); United States v. 7108 West Grand Avenue, 15 F.3d 632 (7th Cir. 1994), cert. denied, Flores v. United States, 114 S. Ct. 2691 (1994). Further, a defendant may have a right to a jury trial in the criminal prosecution but not in the civil litigation. Libretti v. United States, 116 S. Ct. 356, 367-368 (1995).12

From the above discussion, and as this Court has previously acknowledged, "[t]here are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceedings." Witte, 115 S. Ct. at 2208. In recognition of the unique procedural distinctions between criminal prosecutions and civil in rem cases, amici counties urge this Court to adopt the view of the government that parallel criminal and civil cases do not present the potential for abuse that the Double Jeopardy Clause was designed to prevent. Halper, 490 U.S. at 451, n.10.

¹²Although California state law provides for joint trials of civil forfeitures with their underlying criminal cases (Health & Safety Code § 11488.5), the issues discussed above remain unresolved.

VI.

THE CONSTITUTION DOES NOT PROHIBIT SEPA-RATE PROCEEDINGS BY DUAL SOVEREIGNS

The court in \$405,089.23 criticizes the government practice of filing separate criminal and civil cases complaining that "such a manipulative prosecution strategy heightens. rather than diminishes, the concern that the government is forcing an individual to 'run the gauntlet' more than once." \$405,089.23, 33 F.3d at 1216. Likewise, in Ursery the court commented on the lack of coordination of the criminal and civil cases and determined that the "civil forfeiture proceeding and criminal prosecution were two separate proceedings for purposes of double jeopardy analysis." Ursery, 59 F.3d at 575. Inferred from the rulings of these appellate courts is that unless all potential governmental action is imposed in one coordinated hearing the Double Jeopardy Clause is violated. What impact does such a ruling have on separate proceedings imposed by federal and state entities against the same individual?

Prior decisions of this Court have established that double jeopardy is not violated by successive prosecutions by different sovereigns based on the same conduct. United States v. Lanza, 260 U.S. 377, 382 (1922); Abbate v. United States, 359 U.S. 187 (1959). The "dual sovereign rule" has its basis in the concept of federalism that the state power to prosecute derives from separate and independent sources of power and authority that were retained by the states before admission to the Union and preserved to them by the Tenth Amendment. Heath v. Alabama, 474 U.S. 82, 88 (1985). This doctrine has been cited with approval by this Court in the recent opinion in Kurth Ranch, 114 S.Ct. at 1947, n.22. The only exception to the doctrine occurs where the State is bringing its action merely as a "tool of the federal authorities" and was a "sham or cover for the federal prosecution." Bartkus v. Illinois, 359 U.S. 121, 123 (1959). The dual

sovereign rule has been utilized by lower federal courts to uphold forfeiture cases where the criminal prosecution and civil forfeiture were handled by separate federal and state sovereign governments. United States v. Certain Real Property (38 Whalers Cove Drive), 954 F.2d 29, 38 (2d Cir. 1992), cert. denied, Levin v. United States, 506 U.S. 815 (1992).

In spite of this long line of court case precedent, in the aftermath of the appellate decisions of \$405,089.23 and Ursery, numerous challenges are being brought against separately filed criminal and civil cases that were litigated by separate sovereigns. In the federal system the Ninth and Eighth Circuits have addressed the issue, Real Property Located in El Dorado County at 6380 Little Canyon Road, 59 F.3d at 987; United States v. Pena, 67 F.3d 153, 155-156 (8th Cir. 1995) and seven district court decisions are reported out of the Ninth Circuit alone. All of these cases upheld the separate criminal and civil proceedings on the authority of the dual sovereign rule.

The continued vitality of the dual sovereign rule has been questioned in a recent opinion from the Second Circuit where Justice Calabresi stated that "the exception's narrowness combine[d] with significant developments both in substantive federal criminal law and in criminal law enforcement indicate that the entire dual sovereignty doctrine is in need of serious consideration." United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 497 (2nd Cir.

¹³United States v. Jackson, 904 F. Supp. 1185 (D.Or. 1995); United States v. Wolf, 903 F. Supp. 36 (D.Or. 1995); United States v. Wright, 902 F. Supp. 205 (D.Or. 1995); United States v. Unger, 898 F. Supp. 740 (D.Or. 1995); United States v. Bradford, 886 F. Supp. 744 (E.D. Wash. 1995); United States v. De La Cruz Trujillo, 882 F. Supp. 156 (D.Or. 1995), aff d. United States v. Trujillo, 73 F.3d 371 (9th Cir. 1995); United States v. Branum, 872 F. Supp. 801 (D.Or. 1994).

1995). 14 Based on this comment and the vital constitutional issues presented in these cases, amici counties address the Court on the importance of maintaining the dual sovereign rule in civil forfeiture actions.

The dual sovereign rule is the core doctrine that acknowledges that States have inherent powers guaranteed to them under the Tenth Amendment to protect the peace and dignity of their sovereignty. Abbate, 359 U.S. at 194. For a federal prosecution to deprive the State of the ability to exercise its reserved state powers and obligation to control peace within its jurisdiction would be an affront to the principles of federalism established by the Founding Fathers of our constitutional form of government, Bartkus, 359 U.S. at 137-138. Further it would deny a State the power to enforce its own criminal laws because the federal sovereign "won the race at the courthouse." Heath v. Alabama, 474 U.S. at 93. To impose a requirement that all governmental sanctions be imposed in one unified hearing would be highly impractical as it would require federal and state authorities to attempt to keep informed of all potential related offenses. Abbate, 359 U.S. at 195.

The State has a constitutional right to exercise its separate power to confront crime within its jurisdiction and virtually all states have enacted state forfeiture statutes.¹⁵ The states are not thereby dependent upon the federal authorities to exercise the forfeiture power. The purpose of

these statutes is to serve the compelling state interest of eliminating drug trafficking by stripping drug dealers (big and small) of their economic power base (the tools and profits of their trade). Caplin & Drysdale, 491 U.S. at 629.

States utilize the state forfeiture authority as an effective tool to deter economic crime and to complement parallel federal investigations. The case of \$405,089.23 is demonstrative of this principle. Charles Arlt and James Wren were charged by the federal government of conspiracy to manufacture methamphetamine and money laundering and were subsequently convicted. United States v. Arlt, 41 F.3d 516 (9th Cir. 1994).16 The United States government filed a separate civil forfeiture on assets seized by federal and state authorities in connection with that federal criminal investigation in \$405,089.23. State law enforcement authorities seized additional assets for forfeiture pursuant to California Health and Safety Code § 11470 and requested prosecution through the state civil forfeiture law. People v. 1986 Chevrolet Crew Cab Pickup, et al, No. E013870, (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995).17

Although, the federal sovereign filed separate criminal and civil actions, the state only filed a civil action on separate property unrelated to the federal civil forfeiture.

As there was no requirement of a criminal conviction for the state forfeiture action pursuant to California Health and

¹⁴A recent district court case following the reasoning of All Assets of G.P.S. Automotive, 66 F.3d at 497, is found at United States v. Pena, 1995 WL 769117 (D. Kan. Dec. 21, 1995) where the lower court ordered a Bartkus hearing to determine whether the federal government had an independent interest in a federal civil forfeiture following a state criminal prosecution.

¹⁵Lindsay D. Stellwagen, Use of Forfeiture Sanctions in Drug Cases, Research in Brief. Washington, D.C., National Institute of Justice (1985).

¹⁶Arlt's convictions were reversed and remanded for a new trial on December 1, 1994.

¹⁷ According to a verified claim filed by Charles Arlt, the total value of the property seized in the state action was \$374,200.

¹⁸Amici counties support the government's position that the federal civil forfeiture action filed against the assets of Charles Arlt, James Wren and Payback Mines, on the 'proceeds' theory of 21 U.S.C. section 881(a)(6) was remedial, not punitive, and was not a multiple punishment or successive prosecution in violation of the Fifth Amendment's Double Jeopardy Clause.

Safety Code section 11488.4(i), 19 the federal criminal conviction was not a prerequisite to the state forfeiture and a subsequent conviction or acquittal would not have barred the state forfeiture action. One Assortment of 89 Firearms, 465 U.S. at 367; One Lot of Emerald Cut Stones, 409 U.S. at 234-235. Consequently, since no state criminal charges were filed, no double party issue was raised in the state action. The state sovereign only pursued a civil remedial action which did not constitute punishment or run afoul of the Double Jeopardy Clause and was a valid use of its separate state power.

The forfeiture power exercised by federal and state authorities is not mutually exclusive and each sovereign has constitutional authority to vindicate the compelling governmental interest in recovering ill-gotten enterprise proceeds not forfeited by the other sovereign. Therefore, any requirement that two separate sanctions which constitute punishment must be litigated in the same proceeding should not be defined so narrowly as to preclude application of the dual sovereign rule.

CONCLUSION

For all of the foregoing reasons, amici counties urge this Court to reverse the decisions of the Courts of Appeal in the instant cases.

Respectfully submitted,

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Date: February 16, 1996

¹⁹The version of the California Health & Safety law applicable to this action is found at Stats. 1988, ch. 1492 § 9 which was the California asset forfeiture law in effect January 1, 1989 through December 31, 1993.

Nos. 95-345 & 95-346 (Consolidated) FEB 23 1996

IN THE

CLERK

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, Petitioner,

V.

GUY JEROME URSERY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, Petitioner,

V

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, ET AL., Respondents.

> On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE COOK COUNTY STATE'S ATTORNEY'S OFFICE JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

The Cook County State's Attorney's Office is an entity responsible for a vast amount of criminal prosecutions and civil forfeiture actions in the State of Illinois. In 1994 alone, the Cook County State's Attorney's Office instituted approximately 28,000 felony narcotics prosecutions, as well as more than 5,600 drug-related forfeitures. The State of Illinois has enacted forfeiture statutes which are

virtually identical to the statutes at issue in the instant appeal. With this cause, this Court is asked to decide whether double jeopardy principles prohibit successive criminal prosecutions and civil forfeiture actions. In In re P.S., a minor, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court recently considered this question and held that double jeopardy principles are not implicated when the state prosecutes a defendant after obtaining forfeiture of the proceeds of illegal activity in a separate proceeding. Thus, the Cook County State's Attorney's Office has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions in Cook County, Illinois.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens. NDAA has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions across the country.

In accordance with Supreme Court Rule 37.2, this Brief of Amici Curiae is being filed with written consent of all parties to this case.

SUMMARY OF ARGUMENT

In the *Ursery* case, the United States Court of Appeals for the Sixth Circuit held that the double jeopardy provision of the Fifth Amendment prohibited prosecution of the defendant because he had already been punished in a civil forfeiture action brought under 21 U.S.C. §881(a)(7).

In the \$405,089.23 case, the United States Court of Appeals for the Ninth Circuit held that the double jeopardy provision of the Fifth Amendment barred a civil forfeiture action for the proceeds of illegal drug sales where the owners of the subject property had already been prosecuted for criminal violations arising from the same facts. The Courts of Appeals in both of these cases erred in holding that a civil forfeiture action imposes punishment for double jeopardy purposes.

A. Multiple punishments only violate the double jeopardy provision of the Fifth Amendment when they are imposed for the same offense. Because the actions in these cases are not prosecutions for the same offense, the double jeopardy bar does not apply here.

In the cases at bar, while the civil and criminal actions may have arisen out of the same conduct of the defendants, they are not necessarily prosecutions for the same offense. In United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), this Court abandoned the "same conduct" test of Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the test originally set forth in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the Blockburger "same elements" test, two offenses are not the same for double jeopardy purposes as long as each offense contains at least one element that the other does not. In each of the cases at bar, the criminal offense and the related forfeiture action each require proof of an element that the other does not. For this reason, the lower courts erred in applying double jeopardy principles.

B. In the \$405,089.23 case, the Ninth Circuit erred in holding that forfeitures of the proceeds of criminal activity constitute punishment for double jeopardy purposes. This

Court held in *United States v. One Assortment of 89 Fire-*arms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), that the forfeiture of contraband is remedial, and not punitive, because it removes dangerous or illegal items from society. Because the claimants in the \$405,089.23 case had no right to acquire the proceeds of their illegal activities, they were not punished by their forfeiture. The Ninth Circuit therefore erred in applying double jeopardy principles.

C. In the *Ursery* case, the Sixth Circuit erred in holding that forfeiture of property which facilitates a criminal offense always imposes punishment. In fact, many such forfeitures are remedial, rather than punitive, because they remove the instrument through which the claimants commit their crimes, making it impossible for the claimants to commit further crimes. Additionally, these forfeitures provide the type of "reasonable liquidated damages" authorized by this Court in *United States v. Halper*, 490 U.S. 435, 446, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), as they attempt to reimburse the government for the costs to it and society from the claimants' illegal activities.

D. Public policy concerns require reversal of the decisions of the Courts of Appeals. If jeopardy attaches in civil forfeiture proceedings, the government will be denied the opportunity to seek imprisonment of an offender, even though imprisonment was not even an available penalty in the civil forfeiture proceeding. Conversely, where the government instead pursues a criminal action, convicted drug dealers will be allowed to reap the financial rewards of their illegal activities. Finally, the decisions here will have a tremendous adverse impact in state courts where combining civil forfeitures with criminal prosecutions is not an option.

This Court should resolve the split of authority in the Courts of Appeals by clearly defining the circumstances under which a civil forfeiture action will implicate double jeopardy concerns. In making this determination, this Court should consider that in many instances a forfeiture will constitute a different offense from the related criminal prosecution, and that even a forfeiture that does not constitute a different offense may be remedial rather than punitive. Thus, many civil forfeiture actions will not violate the double jeopardy clause's prohibition of multiple punishments for the same offense.

ARGUMENT

THE COURTS OF APPEALS ERRED IN HOLDING THAT THE DOUBLE JEOPARDY CLAUSE BARS THE GOVERNMENT FROM PURSUING BOTH A CRIMINAL PROSECUTION AND A CIVIL FORFEITURE ACTION.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. That clause protects against three distinct abuses: 1) a second prosecution after acquittal for the same offense; 2) a second prosecution after conviction for the same offense; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969). It is the third of these protections—the prohibition of multiple punishments for the same offense-that is at issue here. In the present cases, the United States Courts of Appeals for the Sixth and Ninth Circuits held that a claimant in a successful forfeiture action may not also be criminally prosecuted based on the same set of facts supporting the forfeiture. The decisions of the Courts of Appeals are manifestly erroneous and must be reversed for several reasons. First, the Ninth Circuit blindly applied double jeopardy principles without determining whether the civil and criminal actions involved the "same offense" under the Block-burger/Dixon test, while the Sixth Circuit erroneously concluded that the criminal offense was a lesser included offense of the forfeiture. Second, the Ninth Circuit erred in holding that forfeitures of the proceeds of illegal activity pursuant to 21 U.S.C. §881(a)(6) constitute punishment for double jeopardy analysis. Third, the Sixth Circuit failed to acknowledge that forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C. §881(a)(7) may be remedial rather than punitive for purposes of double jeopardy analysis. Finally, the decisions of the Courts of Appeals conflict with sound public policy.

A. Double Jeopardy concerns are not triggered by a civil forfeiture action and a criminal prosecution, because they do not impose punishment for the "same offense."

In the cases at bar, the Courts of Appeals concluded that the civil forfeitures amounted to punishment, and therefore the government's actions in obtaining civil forfeitures and criminal convictions in separate proceedings violated the Double Jeopardy Clause. In so holding, the Courts of Appeals overlooked a crucial fact: double jeopardy principles do not prohibit the imposition of all multiple punishments, but only those punishments imposed for the same offense. U.S. Const. amend. V; see also United States v. Halper, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1945, 218 L. Ed. 2d 767 (1994). The case of United States v. Dixon, 509 U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) contains the last definitive statement from this Court concerning whether two actions involve the same offense for double jeopardy purposes. In Dixon, this Court held that it is not necessary for the government to show that successive prosecutions were based on different conduct in order to avoid double jeopardy. In so doing, this Court overruled the "same conduct" test of Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the "same elements" test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Under the "same elements" test, now known as the Blockburger/Dixon test, two actions will constitute separate offenses for double jeopardy purposes if each requires proof of an element that the other does not. When applying the Blockburger/Dixon test, courts must focus upon "the statutory elements of each offense, rather than on the actual evidence presented at trial." Illinois v. Vitale, 447 U.S. 410, 416, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980) (emphasis added).

A criminal prosecution requires proof beyond a reasonable doubt of an element not found in a forfeiture case: that the defendant possessed the requisite mental state and performed the proscribed act. To prevail in a forfeiture action, however, the government need only show probable cause to believe that someone has used or obtained the property through prohibited actions. Once the government has met this burden, the burden then shifts to the property owner to establish lack of knowledge or consent. This is an affirmative defense and not one of the elements in the government's forfeiture case. United States v. Thibault, 897 F. Supp. 495, 498 (D. Colo. 1995). "Probable cause does not require a showing of any specific claimant's mens rea. It must only be shown that the property has a substantial nexus with drug related activity." United States v. Falkowski, 900 F. Supp. 1207, 1215 n.8

(D. Alaska 1995). Indeed, a forfeiture action may succeed even without criminal prosecution of the property owner or anyone else. See United States v. One 1987 Jeep Wrangler Automobile, 972 F.2d 472, 476 (2d Cir. 1992). Conversely, a forfeiture case requires proof of an element not necessary to a criminal prosecution: that the subject property was involved in a crime. Thus, because a criminal prosecution and a civil forfeiture each always require proof of an element that the other does not, under the Block-burger/Dixon test a civil forfeiture never has the same elements as a criminal offense.

In In re P.S., a minor, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court applied the Blockburger/Dixon test and concluded that forfeiture of the proceeds of drug sales required proof of different elements from criminal charges of possession of a controlled substance, possession with intent to deliver, and possession without a tax stamp. In reaching this conclusion, the court noted that there was no factual link between the forfeitable proceeds and the criminal offense: "[t]he cash could not have been traced to the proceeds of any sale of any of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold." In re P.S., a minor, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12, *22), citing United States v. Leaniz, No. CR-2-90-18 (S.D. Ohio, March 31, 1995) (1995 U.S. Dist. LEXIS 4039 *15); see also United States v. Rhodes, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

In the \$405,089.23 case, the Ninth Circuit failed to consider whether the civil forfeitures and the criminal offenses were the same under the Blockburger/Dixon test. In the Ursery case, the Sixth Circuit applied the Blockburger/Dixon test, but erroneously concluded that the

criminal offense was a lesser included offense of the forfeiture. However, an examination of the elements of the offenses involved here demonstrates that they are separate offenses under the *Blockburger/Dixon* test.

In the Ursery case, the defendant was prosecuted for manufacturing marijuana in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendant manufactured a controlled substance, and that he did so knowingly. The defendant's residence was forfeited pursuant to 21 U.S.C. \$881(a)(7), which provides for forfeiture of real property used or intended to be used to commit or facilitate commission of a felony violation of title 21 of the United States Code. Each of these statutes contains an element that the other does not. To establish the criminal violation, the government must prove that the defendant acted knowingly or intentionally. The forfeiture action, however, requires no proof of any mental state. Likewise, to obtain forfeiture of the defendant's real estate, the government must prove that the real estate was used or intended to be used to commit or facilitate the commission of a drug offense. The criminal prosecution does not require any proof that any real estate was used in the offense.

The \$405,089.23 case involved two criminal offenses. First, the defendants were prosecuted for money laundering in violation of 18 U.S.C. §1956, which requires proof that the defendants conducted or attempted to conduct a financial transaction involving the proceeds of unlawful activity, and that they did so knowingly or with the intent to promote the unlawful activity. Some of the defendants' property was forfeited under 18 U.S.C. §981(a)(1)(A), which required the government to prove that the property was involved in a violation of §5313(a) or 5324(a) of title 31, or §1956 or 1957 of title 18, or traceable to such prop-

erty. Once again, the criminal prosecution requires proof of a mental state not necessary to the forfeiture, while the forfeiture requires proof of the involvement of property not necessary to the criminal case.

The defendants in the \$405,089.23 case were also prosecuted for conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendants knowingly conspired to manufacture a controlled substance. The defendants' property was forfeited pursuant to 21 U.S.C. §881(a)(6), which allows forfeiture of money furnished or intended to be furnished in exchange for a controlled substance, or proceeds traceable to such an exchange. Once again, each statute contains an element that the other does not. The criminal offense requires proof of a conspiracy to manufacture a controlled substance, but does not require proof of any sale or intended sale. The forfeiture action, on the other hand, requires proof of a sale or intended sale but requires no proof of any conspiracy to manufacture. Thus, the criminal offense and the forfeiture are not the "same offense" under the Blockburger/ Dixon test.

Because the criminal prosecutions and civil forfeitures in these cases are not prosecutions for the same offense, the Courts of Appeals erroneously applied double jeopardy principles in the cases at bar. Accordingly, Amici Curiae respectfully urge this Court to reverse the decisions of the Courts of Appeals.

B. Forfeitures of the proceeds of illegal drug sales pursuant to 21 U.S.C.§881(a)(6) are remedial and do not constitute "punishment."

In United States v. Halper, 490 U.S. 435 (1989), this Court analyzed the application of a \$130,000 civil fine to

a fraud on the government resulting in \$585 in damages, and determined that such an "overwhelmingly disproportionate" assessment amounted to punishment within the meaning of the double jeopardy clause. Thus, this Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Halper, 490 U.S. at 448-49. This Court noted, however, that the government may use civil sanctions to achieve "rough remedial justice," including "reasonable liquidated damages or a fixed sum plus double damages." Halper, 490 U.S. at 446. Accordingly, customs forfeitures following criminal convictions were held permissible as they provide "a reasonable form of liquidated damages" for the costs of investigation and enforcement of the customs laws. Halper, 490 U.S. at 446, citing One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972).

Four years later, in Austin v. United States, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), this Court held that civil forfeitures of property used to further drug trafficking constitute "punishment" for determining the applicability of the Eighth Amendment's excessive fines clause. In making this determination, this Court observed that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." Austin, 113 S. Ct. at 2805 n.4.

In the \$405,089.23 case, the government sought forfeiture of the proceeds of illegal narcotics sales under 21 U.S.C. \$881(a)(6). The Ninth Circuit relied heavily on the Austin case in holding that forfeitures impose punishment, but

failed to recognize that Austin did not determine that all forfeitures constitute punishment. The Austin decision dealt only with forfeitures of facilitating property under 21 U.S.C. §§ 881(a)(4) and (a)(7), and not with forfeitures of the proceeds of illegal drug sales under 21 U.S.C. §881(a)(6).

A claimant has no right to acquire the proceeds of illegal drug sales, and thus has no right to keep the money he acquired. "[I]f money constitutes the proceeds of a drug transaction, it is illegal to possess and thus is rightly considered contraband." United States v. \$45,140.00, 839 F. Supp. 556, 558 (N.D. Ill. 1993). In United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), this Court held that the forfeiture of contraband is remedial, rather than punitive, because it removes dangerous or illegal items from society. In Austin, this Court expressly recognized and reaffirmed this holding. Austin, 113 S. Ct. at 2811. This Court further noted that the Double Jeopardy Clause does not apply to civil forfeiture proceedings which are remedial in nature. Austin, 113 S. Ct. at 2816 n.4. Thus, this Court in Austin clearly recognized that the reasoning underlying its application of double jeopardy principles to property forfeitures has no application to remedial forfeitures of the proceeds of illegal drug sales.

Following this reasoning, numerous courts have reached a result contrary to the decision of the Ninth Circuit in \$405,089.23, distinguishing the property forfeitures at issue in Austin from forfeitures of illegal drug proceeds. These courts have expressly held that because the forfeiture of illegal drug proceeds is remedial, it is not punishment. See United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994); United States v. \$184,505.01 in U.S. Currency, No. 94-3528 (3d Cir., December 29, 1995) (1995 U.S. App. LEXIS 37151); United States v. Fields, No. 94-10185 (5th

Cir., January 9, 1996) (1996 U.S. App. LEXIS 265); United States v. Salinas, 65 F.3d 551 (6th Cir. 1995); United States v. Clementi, 70 F.3d 997 (8th Cir. 1995); United States v. One Parcel of Real Estate Located at Rural Route 9, LaHarpe, Illinois, 900 F. Supp. 1032 (C.D. Ill. 1995); United States v. One 1989, 23 Foot, Wellcraft Motor Vessel, Civ. No. 90-1571(PG) (D. Puerto Rico, December 13, 1995) (1995 U.S. Dist. LEXIS 19687); Clark v. United States, No. 4:95CV129 (E.D. Va., December 19, 1995) (1995) U.S. Dist. LEXIS 19992); United States v. \$288,930.00, 838 F. Supp. 367, 370 (N.D. Ill. 1993); \$45,140.00, 839 F. Supp. at 558; United States v. Moffitt, 875 F. Supp. 1190, 1197 (E.D. Va. 1995); Maldonado v. United States, No. 94 Civ. 7120 (S.D.N.Y. Jan. 6, 1995) (1995 U.S. Dist. LEXIS 108, *6); and United States v. Haywood, 864 F. Supp. 502, 507-09 (W.D.N.C. 1994). As the Tilley court explained:

The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Tilley, 18 F.3d at 300 (quoting Halper, 490 U.S. at 449).

Because the forfeiture of illegal drug proceeds does not impose punishment, this type of action does not implicate the Double Jeopardy Clause. The Ninth Circuit in \$405,089.23 ignored the remedial nature of forfeitures of illegal drug proceeds, and erroneously extended the reason-

ing of Austin. Accordingly, the decision of the Court of Appeals for the Ninth Circuit must be reversed.

C. Forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C.§881(a)(7) are remedial and do not constitute "punishment."

As demonstrated in Point B herein, forfeitures of the proceeds of illegal activity are clearly remedial. But even a forfeiture of property which facilitates a crime can be remedial. For example, the forfeiture of a crack house to abate a public nuisance would certainly be remedial. Likewise, the forfeiture of property used to facilitate the distribution of illegal drugs is remedial. Property which a claimant may have lawfully acquired becomes contraband when the claimant chooses to use it to further his illegal activities. In United States v. Cullen, 979 F.2d 992 (1992), the Fourth Circuit upheld the forfeiture of a building which housed a clinic and pharmacy from which a physician distributed controlled substances outside the scope of legitimate medical practice. The Court determined that although "[a]ny sanction imposed by the government may have a retributive aspect," the forfeiture of the physician's building "plainly served a remedial purpose, by removing the instrument through which [the physician and his wife] had plied their unlawful trade." Cullen, 979 F.2d at 994. The court went on to note that "[t]he removal of an instrument of the offense is not primarily an act of punishment; rather, forfeiture protects the community from the threat of continued drug dealing." Cullen, 979 F.2d at 994. Ultimately, the court held that "the Double Jeopardy Clause does not apply to civil forfeitures where the property itself has been an instrument of criminal activity." Cullen, 979 F.2d at 995. Accord, United States v. Erinkitola, 901 F. Supp. 80 (N.D.N.Y. 1995) (forfeiture of car driven to scene of drug offense

is remedial because it removes instrumentality of the crime from circulation); Pennsylvania v. Wingait Farms, 659 A.2d 584 (Pa. Commw. Ct. 1995) (forfeiture of horse farm remedial and not punitive, relying on One Assortment of 89 Firearms, 465 U.S. 354 (1984)). Similarly, in the \$405,089.23 case, Payback Mines was a front corporation through which the claimants laundered illegal drug proceeds. Thus, forfeiture of the assets of that corporation was remedial, as it simply deprived the offenders of the instrument of their crimes.

The majority of this Court in Austin expressly left open the possibility that some forfeitures of facilitating property may serve a remedial purpose:

[I]t appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Austin, 113 S. Ct. at 2812 n.14 (emphasis added). Moreover, the Halper Court expressly noted that the government is entitled to "rough justice." As the Fifth Circuit observed in Tilley, the costs to the government and society from illegal drug offenses runs from \$60 to \$120 billion per year. See Tilley, 18 F.3d at 299. While it may be inequitable to "plac[e] full responsibility for the 'war on drugs' on the shoulders of every individual claimant," such national costs may be used to exhibit a "rough proportionality" between the sanction and the resulting governmental and societal costs in a particular case. Tilley,

¹ United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir. 1992).

18 F.3d at 299. See also Kurth, 114 S. Ct. at 1954 (O'Connor, J., dissenting) ("[M]easuring the costs actually imposed by every participant in the illegal drug trade would be, to the extent that it is even possible, so complex as to make the game not worth the candle. Thus, the government must resort to approximation—in effect, it exacts liquidated damages." (Citation omitted)). Accordingly, in *United States v. Buchanan*, 70 F.3d 818, 830 n.12 (5th Cir. 1995), the Fifth Circuit held that forfeiture of facilitating property is not punitive if "rationally related to the governmental and societal losses associated with [defendant's] crack cocaine operation."

In United States v. A Parcel of Land With A Building Located at 40 Moon Hill Road, Northbridge, Massachusetts, 884 F.2d 41 (1st Cir. 1989), the First Circuit upheld the forfeiture of a 17.9 acre tract of land, including a home and other buildings, where the land was used to cultivate marijuana with the intent to distribute it. The court stated:

Even for an infraction of the narcotics laws far smaller in magnitude than that of appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury and loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance. . . .

40 Moon Hill Road, 884 F.2d at 43.

Because the Courts of Appeals in these cases failed to acknowledge the remedial nature of the forfeitures at issue here, their decisions are erroneous. Therefore, Amici Curiae respectfully urge this Court to reverse the decisions of the Courts of Appeals in these cases.

The decisions of the Courts of Appeals contravene sound public policy.

The legislature clearly intended forfeiture proceedings to supplement, rather than supplant, criminal trials. In United States v. Furlett, 781 F. Supp. 536 (N.D. Ill. 1991), the court explained the injustice that results from invalidating criminal penalties based upon prior civil sanctions. Furlett, 781 F. Supp. at 541. The court noted that the limited range of remedies available in civil proceedings does not include incarceration. Thus, if jeopardy attaches to penalties imposed in a prior civil proceeding, the government would be denied the opportunity to seek imprisonment, despite the fact that imprisonment was not even an available penalty in the civil proceeding. Furlett, 781 F. Supp. at 541. These same concerns apply with equal force to drug forfeitures.

Likewise, barring the government from removing the proceeds of illegal drug sales from the hands of convicted drug dealers contravenes sound public policy. A convicted criminal should not be unjustly enriched by being permitted to retain his ill-gotten gains. See United States v. Borromeo, 1 F.3d 219 (4th Cir. 1993) ("It is arguable that there is little justification for the position that one who successfully parlays his tainted dollar into a fortune should be permitted to enjoy a windfall. . . . ") Yet that is precisely the result that will follow from the decisions of the Courts of Appeals in these cases.

Furthermore, affirmance of the decisions of the Courts of Appeals in these cases would wreak havoc on state prosecutions across the nation. For example, although the federal government may choose to bring criminal forfeiture actions, rather than civil forfeiture actions, see 21 U.S.C. § 853, no such alternative exists in Illinois. Therefore, combining forfeiture proceedings with criminal prosecutions would not solve the dilemma created by the decisions of the Courts of Appeals. Combining the two proceedings would create countless problems, and drafting adequate jury instructions for a combined proceeding would be most difficult. To illustrate, in a criminal prosecution, the State must prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). In a civil forfeiture action pursuant to the Illinois Drug Asset Forfeiture Procedure Act, however, once the State shows probable cause for the forfeiture of the property, the burden shifts to the claimant to establish by a preponderance of the evidence that his interest in the property is not subject to forfeiture, 725 ILCS 150/9(G) (1992). Thus, even if the State is unable to prove the criminal charge beyond a reasonable doubt, the claimant still may be unable to meet his burden to show that the property is not subject to forfeiture. If the proceedings were combined, however, the State's burden of proof on the forfeiture would effectively be raised to beyond a reasonable doubt. This result is directly contrary to the legislature's clearly expressed intent.

Other important differences between the two proceedings militate against combining them. Because a forfeiture action is civil in nature, the State is permitted to conduct discovery and take depositions, see Ill. S.Ct. R. 201 & 202, and the State may call the claimant as its own witness. Similarly, a claimant is not entitled to counsel in a civil forfeiture action. See Scott v. Illinois, 440 U.S. 367, 369-74, 99 S. Ct. 1158, 1159-62, 59 L. Ed. 2d 383, 386-89 (1979) (constitutional right to appointment of coun-

sel is generally limited to criminal proceedings which result in actual imprisonment); see also United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564 (9th Cir. 1995) (civil forfeiture is not a prosecution for purposes of Sixth Amendment right to counsel). Additionally, Illinois' Drug Asset Forfeiture Procedure Act specifically directs that the trial judge consider hearsay evidence in determining whether the State has established probable cause that the asset is subject to forfeiture, and further provides that the laws of evidence applicable to civil actions shall apply. 725 ILCS 150/9(B) (1992). Because of these crucial differences between civil forfeitures and criminal prosecutions, the proceedings necessarily must be conducted separately in accordance with the legislature's clearly expressed intent.

For all of these reasons, this Court should reverse the decisions of the Courts of Appeals and hold that the civil forfeitures in these cases do not implicate the double jeopardy clause.

CONCLUSION

The Cook County State's Attorney's Office and the National District Attorneys Association, as *Amici Curiae*, respectfully request that this Honorable Court reverse the judgments of the United States Courts of Appeals for the Sixth and Ninth Circuits and hold that the forfeitures in these cases do not implicate the Double Jeopardy Clause.

Respectfully submitted,

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IN THE

Supreme Court of the United

OCTOBER TERM, 1995

Startes Court, U.S.

MAR 22 1996

OLERK

UNITED STATES OF AMERICA.

Petitioner.

GUY JEROME URSERY,

Respondent.

UNITED STATES OF AMERICA.

Petitioner,

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, et al.,

Respondents.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

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INTEREST OF AMICUS 1

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The government's aggressive use of federal civil forfeiture statutes to punish or deter conduct that is also the subject of parallel criminal proceedings threatens many constitutional values of great concern to the ACLU and its members. Multiplicitous proceedings punishing the same conduct are inherently offensive to double jeopardy principles. The government's ability to manipulate the order of parallel civil and criminal proceedings further adds to the anxiety, expense, and risk suffered by criminal defendants in many ways to be detailed below. The ACLU believes that the potential for prosecutorial overreaching cannot be curbed unless the Court declares that civil forfeiture and criminal proceedings concerning the same conduct may not be brought separately.

STATEMENT OF THE CASES

In No. 95-345, Michigan State police officers found 142 marijuana plants growing in a field adjacent to respondent Guy Ursery's property, and a small amount of marijuana paraphernalia inside his home. The United States began an in rem forfeiture proceeding on September 30, 1992, seeking to forfeit the Ursery family's residence pursuant to 21 U.S.C. §881(a)(7), on the theory that the residence had been used to facilitate a marijuana offense. On February 5, 1993, Ursery was charged in a one-count indictment with manufacture of marijuana in violation of 21 U.S.C. §841(a)(1).

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The civil forfeiture action was settled by consent judgment entered on May 24, 1993; Ursery was convicted by a jury on July 2, 1993, and sentenced, on January 19, 1994, to 63 months imprisonment and four years supervised release.

In No. 95-346, respondents Charles Arlt and James Wren were tried on an indictment handed down on June 12, 1991, charging them with manufacturing methamphetamine, money laundering, and conspiracy, pursuant to 21 U.S.C. §§841, 846 & 18 U.S.C. §§371, 1956; on June 17, 1991, the United States instituted a civil forfeiture action seeking to forfeit several bank accounts and various items of personal property, some on the theory that they were proceeds of illegal narcotics transactions under 21 U.S.C. §881(a)(6), and some on the theory that they were "involved in" money laundering violations under 18 U.S.C. §981(a)(1)(A). Arlt and Wren were convicted on March 27, 1992; on April 1, 1993, the district judge presiding over the forfeiture action granted the government's summary judgment motion. 33 F.3d at 1214.

Respondent Ursery's criminal conviction was reversed by the Sixth Circuit Court of Appeals on the ground that respondent had previously been put in jeopardy for the same offense by the forfeiture proceeding, 59 F.3d 568 (1995). The judgment forfeiting respondents Arlt and Wren's property was also reversed, by the Ninth Circuit Court of Appeals, on the ground that they too had been put twice in jeopardy. 33 F.3d 1210 (1994).

SUMMARY OF ARGUMENT

The separate civil forfeiture and criminal proceedings brought by the government in both cases below violated, for several interrelated reasons, the Double Jeopardy Clause's guarantee that no one shall be put twice in jeopardy for the same offense.

First, this Court's precedents compel the conclusion that the civil forfeitures at issue in these cases constitute punishment within the meaning of the Double Jeopardy Clause. Second, the Double Jeopardy Clause bars successive punishments regardless of whether the punishments are imposed in civil or criminal proceedings. Third, the successive punishments imposed in both cases below by civil forfeiture and criminal conviction are punishments for the same offense, as this Court has defined that term in its Double Jeopardy jurisprudence.

1. This Court has firmly rejected the formalistic view that legislatures may evade otherwise applicable constitutional restrictions on criminal or quasi-criminal proceedings simply by slapping a "civil" or "in rem" label on its creations. For example, in Austin v. United States, 509 U.S. __, 113 S.Ct. 2801 (1993), a unanimous Court ruled that civil forfeiture proceedings can be punitive and therefore subject to Eighth Amendment limitations. In United States v. Halper, 490 U.S. 435 (1989), the Court unanimously held that civil proceedings are punishment covered by the Double Jeopardy Clause when their purposes are not solely remedial. See also Department of Revenue of Montana v. Kurth Ranch, 511 U.S. __, 114 S.Ct. 1937 (1994).

Together, Halper and Austin establish a two-step analysis in double jeopardy cases. Under Austin, the determination of whether a particular forfeiture is punitive is made, in the first instance, by looking at the statute involved. If the history and design of the forfeiture statute reveal an intent to punish, at least in part, the Double Jeopardy Clause applies. Under Halper, even a forfeiture statute that is solely remedial on its face can raise double jeopardy concerns if it is punitively applied in a particular case. Here, it is unnecessary to reach the second step of the analysis because the forfeiture statutes invoked by the government — including 21 U.S.C. §881(a)(7), the same statute at issue in Austin — are

indisputably punitive, at least in part.

2. The values of the Double Jeopardy Clause are implicated whenever punishment is imposed in two separate proceedings. Two different judges preside; there are two triers of fact; issues concerning the punitive forfeiture can linger for years after a criminal verdict. The risk that the government may wear down its targets increases, particularly in light of procedural weapons, like discovery and burden of proof, that give the government powerful advantages in civil forfeiture proceedings that would be wholly unavailable in a criminal prosecution.

The Court was therefore right in Halper when it concluded that the Double Jeopardy Clause can bar a civil proceeding. Indeed, this Court's forfeiture cases have consistently applied a variety of constitutional guarantees outside the Sixth Amendment (which is by its terms and structure reserved to criminal "prosecutions") to ensure that such proceedings do not punish unfairly. Excessive punishment, covered in Austin, is not the only relevant constraint. See, e.g., One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)(unanimously applying Fourth Amendment exclusionary rule to forfeiture proceedings); United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971)(privilege against self-incrimination, under appropriate circumstances); Boyd v. United States, 116 U.S. 616, 634 (1886)(same); United States v. James Daniel Good Real Property, 510 U.S. __, 114 S.Ct. 492 (1993)(due process notice and opportunity to be heard, absent exigent circumstances).

3. The parallel civil forfeiture and criminal proceedings in these cases did inflict double jeopardy for the same "offense" within the meaning of the Double Jeopardy Clause because the forfeiture statutes at issue subsume the underlying criminal offenses. Therefore, these multiple punish-

ments, although they would have been allowable in a single proceeding, may not be imposed in separate proceedings. To what extent the Due Process Clause would permit civil forfeiture and criminal proceedings to be joined, so that the government could enjoy the advantage of a lower burden of proof with respect to the penalty of forfeiture, is not an issue presented in this case.

ARGUMENT

I. THE CIVIL IN REM FORFEITURES IN THESE CASES CONSTITUTED PUNISHMENT THAT PLACED THE RESPONDENTS IN JEOPARDY WITHIN THE MEANING OF THE FIFTH AMENDMENT

The government's most fundamental objection to the decisions of the courts below is that the civil forfeitures in these cases do not constitute "punishment." Brief of the United States at 36-49. Consequently, the government claims, their imposition in cases in which the government also sought to punish the property owners criminally did not subject respondents to multiple, repetitive punishments or proceedings. The government's argument, however, is inconsistent with this Court's decisions in United States v. Halper, 490 U.S. 435, and Austin v. United States, 113 S.Ct. 2801. See also Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937. Halper, Austin, and Kurth Ranch establish that Congress may not evade fundamental constitutional rules limiting punitive sanctions simply by applying a "civil" or "remedial" label to punishments for criminal conduct. This principle, essential to prevent the erosion of constitutional standards by an empty formalism, necessarily requires a more thoughtful and complex analysis of particular legislative regimes than a simplistic jurisprudence of labels. All forfeiture statutes, and even all forfeitures under the

same statutes, are not the same. But Halper and Austin establish the framework for analysis of civil forfeiture laws that should govern in these cases, protecting both the legitimate law enforcement interests underlying forfeiture statutes and the fundamental rights guaranteed by the Constitution.²

A. Under Halper And Austin, Forfeiture Provisions That Are Not Solely Remedial In Intent And Effect Impose Punishment For Purposes Of The Double Jeopardy Clause

In Halper, this Court unanimously recognized that a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause. The Court expressly rejected any claim that the "civil" or "criminal" label attached to a proceeding or remedy is of great importance in determining whether a person subjected to it is placed in "jeopardy." 490 U.S. at 447-48. The core holding of Halper was that

Halper dealt with a liquidated damages provision fixing a specific, minimum recovery for the government in a civil action to recover for false claims made by a service provider. The basic legislative scheme in Halper was concededly remedial, closely resembling familiar liquidated damages provisions in private contracts. Nevertheless, the Court held that when the penalty set by the statute was grossly disproportionate to the actual damages suffered by the government, the penalty could no longer be considered purely remedial, even allowing for the "inevitabl[e] . . . rough justice" quality of liquidated damages provisions. Id. at 449. Though the statutory provision was intended to be remedial, under a case-by-case "rule . . . of reason," a court could determine, by an accounting of the government's actual "damages and costs" that, as applied to a particular situation the compensatory rationale had been exceeded, and the penalty "cross[ed] the line between remedy and punishment." Id. at 449-50.

Austin analyzed the distinction between the remedial and the punitive in the very different context of civil forfeitures resulting from narcotics crimes. Once again, the Court was unanimous, this time in holding that the Excessive Fines Clause of the Eighth Amendment applied to civil forfeitures under one of the very statutes at issue in this case, 21 U.S.C. §881(a)(7). As in Halper, the Court ruled that the issue was not whether a forfeiture served some remedial purpose. Rather, a forfeiture contained a punitive element, and was subject to the constitutional limitation on punishment, so long as its purposes and effects were not entirely remedial: "'[A] civil sanction that cannot fairly be said solely to serve a remedial function . . . is punishment." 113

² This Court's approach to the problem of forfeiture and double jeopardy has fluctuated over time. Coffey v. United States, 116 U.S. 436 (1886), held that an acquittal in a criminal case precluded a later civil in rem forfeiture action. In United States v. 89 Firearms, 465 U.S. 354 (1984), the Court overruled Coffey, assuming that the Double Jeopardy Clause is not applicable unless "the proceeding is essentially criminal in character," 465 U.S. at 362, and applying the factors set out in United States v. Ward, 448 U.S. 242 (1980), and Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), for determining when nominally civil proceedings are properly characterized as "criminal." Halper established current law by rejecting the 89 Firearms approach, specifically declining to use the Kennedy/Ward test to define the coverage of the Double Jeopardy Clause. In Austin, 113 S.Ct. at 2806 n.6, the Court also rejected the Kennedy/Ward test as a definition of punishment for Eighth Amendment purposes. See also Kurth Ranch, 114 S.Ct. at 1944-48 (using the Halper methodology to determine what is punishment for purposes of the Double Jeopardy Clause).

S.Ct. at 2806, quoting *Halper*, 490 U.S. at 448 (emphasis added).³

The Austin Court pointed out that its precedents had "consistently recognized that forfeiture serves, at least in part, to punish the owner." 113 S.Ct. at 2810.4 Moreover, and of critical importance, the Court analyzed the specific nature and purposes of the particular forfeiture provisions before the Court -- those provided in 21 U.S.C. §§881(a)(4) and (a)(7) -- and concluded that these particular forfeiture provisions bore specific indicia of serving the classically punitive purposes of retribution and deterrence.

First, the drug forfeiture provisions contain an innocent owner defense, thus "focus[ing] the provisions on the culpability of the owner." Austin, 113 S.Ct. at 2810-11. Second, Congress chose "to tie forfeiture directly to the commission of drug offenses," making the property forfeitable not because of its nature but because of its particular relation to the commission of a criminal offense. Id. at 2811. Third, in enacting these particular forfeiture provisions, Congress expressly intended them to supplement "the traditional crim-

³ Austin and Halper are clearly correct in holding constitutional limitations on punishment applicable to penalties that are not entirely remedial. The Double Jeopardy and Excessive Fines Clauses do not contain exceptions authorizing multiple or excessive punishments so long as those punishments are packaged together with civil or remedial monetary awards. If a governmental action serves as a punishment, even in part, the punitive component of that action must be imposed in accordance with constitutional standards.

The government argues that the analyses of Halper and Austin are radically distinct and that, for purposes of the Double Jeopardy Clause, as opposed to the Excessive Fines Clause, the questions of whether a forfeiture is punitive must be decided by a "case-by-case inquiry," as in Halper, rather than "categorical[ly]," as in Austin. Brief of the United States at 13-14. The government is wrong. The case-by-case analysis in Halper is not a substitute for, but an addition to, the categorical approach of Austin. The different emphases in Halper and Austin are attributable not to the different constitutional clauses involved, but to the different statutory schemes at issue. Specifically, the statutory penalty in Halper was not in itself punitive because it was expressly designed as remedial and compensatory. The issue therefore became whether such a statute, as applied to Halper's particular facts, could exceed its remedial purposes and become punitive. The statutory penalty at issue in Austin, on the other hand, was inherently punitive - it had no nongovernmental civil analogue and had been specifically intended by Congress to serve in large part as punishment. Moreover, forfeitures (unlike liquidated damages) are the closest to criminal punishments of all civil penalties, and have long been recognized as at least "quasi-criminal in character." One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. at 700 (by a unanimous Court); see also Boyd v. United States, 116 U.S. at 634.5

⁴ The Court's dicta on this issue have not been entirely consistent. The majority opinion in the Court's recent decision in Bennis v. Michigan, No. 94-8729, 1996 WL 88269 (March 4, 1996), emphasizes portions of the case law that highlight the remedial aspects of traditional forfeitures. The Austin opinion, however, authoritatively demonstrates that the Court has at least as often recognized that the "civil" quality of forfeitures is often largely fictional. 113 S.Ct. at 2808-10.

In analyzing the double jeopardy claim in 89 Firearms, 465 U.S. 354, a case on which the government otherwise heavily relies, the Court's unanimous opinion did not ask whether the particular forfeiture at issue (continued...)

Taken together, then, Halper and Austin establish three basic principles: First, and most importantly, the "punishment" issue cannot be determined by labels. The denomination of a penalty as "civil" or "in rem" does not prevent that penalty from being a "punishment" which, under the Double Jeopardy Clause, can only be imposed once for the same offense. Second, a penalty is punishment if it cannot fairly be characterized as solely remedial in its application. Third, particular penalties enacted by Congress can be identified, on the basis of their characteristics and the legislative purpose behind their adoption, as intrinsically serving punitive purposes. These principles should dictate the determination of whether the forfeitures imposed on respondents here constituted punishment.

B. The Forfeitures In The Instant Cases Are Punitive

The government's attribution of remedial purposes to the forfeitures in question ignores the nature and legislative

(...continued)

history of the particular forfeiture provisions at issue, constructing instead an entirely hypothetical set of nonpunitive purposes derived from other applications of completely different forfeiture statutes.

The purposes, scope, incidents and utilization of forfeiture have changed dramatically over time. See generally Leonard W. Levy, A LICENSE TO STEAL: FORFEITURE OF PROPERTY 1-81 (1996). Just as Congress may not escape limitations imposed by the Constitution by labeling proceedings "civil," so this Court should not misuse history by noting that in rem forfeiture was familiar to the framers, and then concluding that whatever Congress chooses to label an in rem forfeiture would have been recognized as such by James Madison. The forfeitures in the cases before the Court include modern innovations that cannot be passed off as traditional anomalies that, for historical reasons, may receive a free pass from constitutional scrutiny, for they differ "not only in degree, but in kind, from [their] historical antecedents." United States v. James Daniel Good Real Property, 114 S.Ct. at 515 (Thomas, J., concurring in part and dissenting in part). All forfeitures are not created equal, and the characterization of a forfeiture as punitive or remedial will depend on the nature of the particular forfeiture involved.

Many forfeitures have obviously remedial purposes. Forfeitures of contraband, for example, and forfeiture of many types of instrumentality of crime, will often have the remedial purpose of removing dangerous items from circulation. Narcotics, for example, may be seized, forfeited and destroyed by the government because it is illegal and dangerous for any unauthorized person to possess them. Smuggled goods are a special form of contraband in that they may not lawfully be possessed in this country until the customs duty is satisfied, regardless of the culpability of the person possessing the goods. Weapons, burglar tools, and

imposed a financial burden that exceeded some putative "cost" to the government of the crime at issue. Rather, exactly as in Austin, it examined the particular forfeiture statute at issue and found it to be remedial (intended to "further the prophylactic purposes of the 1968 gun control legislation . . . Keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive"). 465 U.S. at 364. Unlike the forfeitures at issue in this case, the firearms forfeiture provisions have never been characterized as, and do not have the effect of, imposing heavy financial penalties on criminals. Similarly, in Kurth Ranch the Court did not assess whether Montana's marijuana tax, as applied to Kurth, was in excess of some appropriate "remedial" tax amount, but instead examined the attributes and purposes of the tax scheme to decide that the tax was intrinsically punitive. 89 Firearms and Kurth Ranch are inconsistent with the government's effort to depict Halper as imposing a rigid case-by-case methodology from which Austin supposedly departed.

alcoholic beverages, and the component parts or substances used to make them, may be declared forfeit when they are used in the commission of a crime, not simply as a supplement to fines or imprisonment, but because such items are dangerous and therefore subject to remedial regulation of their possession and use. Moreover, the punitive component of such forfeitures is minimal, given the relatively low legitimate value of such items. The vast majority of this Court's cases dealing with forfeiture, and particularly the early cases relied upon to provide historical validation for the supposed remedial underpinnings of civil forfeitures generally, deal with forfeitures of this kind.

But neither of the forfeitures now before the Court stems from such traditional uses of forfeiture. The statute at issue in Ursery (No. 95-345), 21 U.S.C. §881(a)(7) -- the very statute found in Austin to have a punitive purpose -was first enacted in 1984, as part of the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837. While the government before this Court solemnly invokes the traditional purposes of in rem forfeiture of property, such as inducing owners of property to use care, abating a nuisance, and "insuring an indemnity to the injured party," Brief of the United States at 44-45, these supposedly remedial objectives are nowhere mentioned in the legislative history. The Senate Report accompanying the Act rarely distinguishes between civil and criminal forfeiture, referring repeatedly and indiscriminately to "forfeiture" as an additional sanction to "deter or punish" lucrative crimes for which "the traditional criminal sanctions of fine and imprisonment are inadequate." S.Rep.No. 225, supra, at 191. The particular provision extending civil narcotics forfeitures to real property used in furtherance of narcotics crimes, and the new amendments to the criminal forfeiture provisions of RICO to include forfeiture of the proceeds of RICO violations, are described as two aspects of an initiative to realize "the full law enforcement potential of forfeiture" by increasing the extent of asset seizures, id. at 194-95. Moreover, the same 1984 legislation that added the real property subsection to the narcotics civil forfeiture statute expanded the criminal forfeiture provisions, formerly limited to continuing criminal enterprise cases, to cover all narcotics felonies, see Pub.L.No. 98-473, supra, §303, and also, like the newly enhanced civil forfeiture provision, to include forfeiture of real estate. See, e.g., S.Rep.No. 225, supra, at 211. Thus, the very forfeiture provisions touted here by the government as remedial were designed by Congress as means of punishing and deterring criminal conduct.6

In light of this history, it simply defies reality for the government to claim that forfeitures of narcotics offenders' real property pursuant to such a statute are not at least partially punitive in nature. Nor would a serious application of the government's proposed "case-by-case" analysis lead to a different result. This is not a case, like those cited by the government, in which the property constituted a public nuisance because the entire premises constituted an open and notorious drug market. Cf. United States v. 141st Street

⁶ Significantly, under the parallel criminal forfeiture provision enacted in tandem with §881(a)(7), respondent Ursery's property could have been forfeited criminally, as part of the same proceeding in which he was charged with criminal conduct, see 21 U.S.C. §853(a)(2). That the government chose, presumably for tactical reasons, to undertake two separate proceedings does not erase the clear punitive aspect of this forfeiture.

⁷ Since Ursery and Austin involve the same statute, the observations of the Austin Court concerning the close link between the forfeiture and the commission of crime, and the availability of the innocent-owner defense, 113 S.Ct. at 2810-11, apply to this case as well. See also Good, 114 S.Ct. at 515 (Thomas, J., discussing the same statute).

Corp., 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), cited in Brief of the United States at 44 n.12. Any claim that Ursery's home constituted a public danger or nuisance, either intrinsically or under his ownership, is defeated by the fact that the government chose to allow Ursery to retain ownership of the home, settling the forfeiture case for a financial payment. See 59 F.3d at 570. The effect of the supposedly "remedial" action was thus neither more nor less than to impose a fine on Ursery for misusing his property.⁸

In \$405,089.23 (No. 95-346), the government sought forfeiture of "proceeds" and property "involved in" money laundering violations pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A). Like §881(a)(7), these statutes are hardly time-honored features of common-law jurisprudence. As even the government concedes, "[s]tatutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other in rem forfeitures." Brief of the United States at 14.

The first forfeiture provision explicitly permitting the forfeiture of the proceeds of narcotics transactions was the criminal forfeiture provision of 21 U.S.C. §848, adopted as §408 of Pub.L.No 91-513, 84 Stat. 1236, the Comprehensive Drug Abuse Prevention and Control Act of 1970. Section 511 of the same Act adopted a civil forfeiture regime for various categories of property, now essentially codified

The government here did not seek to punish a drug dealer, and then seek to "remedy" the carelessness of a property owner who tolerated his activity, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); see also Bennis v. Michigan, 1996 WL 88269. This case — like any case that will present double jeopardy problems due to parallel civil and criminal proceedings — involves a two-fold punishment of the same actors for engaging in criminal conduct on or with their property.

in 21 U.S.C. §§881(a)(1) - (a)(5). But the proceeds provision of §881(a)(6) was not added until 1978, in "an important expansion of governmental power." United States v. 92 Buena Vista Avenue, 507 U.S. 111, 121 (1993). The Joint Explanatory Statement submitted to Congress with this bill expressly recognized "the penal nature of forfeiture statutes," 1978 U.S.C.C.A.N. 9518, 9522, and made no reference to the post hoc claim of the government and of some lower courts that forfeitures of proceeds are remedially intended to repay the government for the costs of prosecution. Brief of the United States at 44-46. Rather, the provision was passed by the Senate following a speech by its sponsor urging that:

The criminal justice system can only be effective if there is a meaningful deterrent . . . The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking Thus, the punitive and deterrent purposes of the Controlled Substances Act would have greater impact on drug trafficking.

As noted above, in 1984 substantially identical criminal forfeiture provisions were added, giving the government the

^{9 124} Cong. Rec. 23055 (July 27, 1978)(remarks of Sen. Nunn). Similarly, the House was urged to accept this expansion of civil forfeiture on the ground that it would be "an extremely important weapon against the financial backers of illegal drug trafficking since it reaches them where it hurts the most. No longer will the big-money men of illegal drugs be able to hide their ill-gotten profits with impunity." 124 Cong. Rec. 36949 (Oct. 13, 1978)(remarks of Rep. Wolff). Since the forfeiture provision was added to another bill on the floor of the Senate, the quoted remarks constitute essentially the only explanations provided to the Congress of the purpose and import of the provision.

choice of proceeding in a single criminal action if it chose to do so. The legislative history does not suggest that Congress envisioned the new criminal forfeiture of proceeds as playing any different role than civil forfeitures -- the criminal alternative was simply seen as a "more efficient method of obtaining the forfeiture of assets of drug defendants" in certain circumstances. S.Rep.No. 225, supra, at 197.

The money laundering forfeiture provisions of 18 U.S.C. §981 were first enacted in 1986, as part of the same legislation that created the criminal money laundering provisions of 18 U.S.C. §§1956 and 1957, and the attendant criminal forfeiture provisions of 18 U.S.C. §982. Today, after extensive expansions and amendments, the civil and criminal forfeiture provisions relating to money laundering are substantially identical. As in *Ursery*, the government could have sought forfeiture of the same property it seeks here as part of a single proceeding, by invoking the criminal forfeiture provisions of §982, instead of bringing a separate civil action under §981. Like the narcotics civil forfeiture provisions, moreover, §981 focuses on the culpability of property owners by including an innocent owner defense. 18 U.S.C. §981(a)(2).¹⁰

The government nevertheless argues that stripping drug dealers of the proceeds of crime is not punitive, because it is designed to "prevent unjust enrichment," Brief of the United

States at 47-48, or because "proceeds forfeiture can never be out of proportion to the 'loss' suffered by the government or society." Id. at 49, quoting Smith v. United States, No. 95-2259, 1996 WL 72858, at *3 (7th Cir. Feb. 21, 1996). But this is sophistry. It may well be that a fine or forfeiture that is limited to the profit a criminal has made from crime cannot be constitutionally disproportionate or excessive, or even that such a fine or forfeiture is inadequate punishment to constitute an effective deterrent. But a weak or insufficient punishment is still punishment. Until the government's recent quest to rationalize its position on civil forfeitures, no one would ever have claimed that the generally inadequate fines that characterized federal criminal law until the 1980's did not constitute punishment because they often did not suffice to make crime financially unprofitable.

Forfeiture of criminal proceeds was brought into the law as part of RICO and the continuing criminal enterprise statutes precisely because existing financial sanctions were inadequate as punishment, which must at least remove the profits from crime regardless of whatever additional sanctions may then be imposed. See Russello v. United States, 464 U.S. 16, 25 (1983).

The government's attempt to recast punitive sanctions as a *Halper*-like "liquidated damages" provision, intended to "compensate" the government for the "social costs" of crime, is equally unavailing. Crimes like those of respondents surely impose a social cost. But it is the very essence of criminal punishment that it is directed not at the private compensation of individual victims for the harms they suffer through crime, but at retribution for the more generalized harm to the social order inflicted by criminals. In *Halper* the government sought, at least in part, compensation for specific harm to its proprietary interests. When the government seeks a "remedy" for the social damage inflicted by

The history, nature, and purposes of the narcotics forfeiture provisions at issue here entirely distinguish *Bennis v. Michigan*, 1996 WL 88269. That case concerned a statute that was expressly constructed to deal with a traditional remedial goal of forfeiture: the abatement of public nuisances created by the use of property for purposes of keeping brothels. As Justice Thomas pointed out, the treatment of forfeitures as remedial should be "strictly" limited, "adhering to historical standards." *Id.* at *8 (Thomas, J., concurring).

drug dealers, it is engaged in the classically retributive and deterrent exercise of criminal punishment.

Once again, the government's proposed "case-by-case" methodology would yield the same results as a more categorical analysis. Where, as here, the forfeiture of proceeds is sought from the very person who is separately charged with the crime that generated them, the forfeiture results directly from the commission of the crime charged. Moreover, as the court of appeals recognized, the forfeitures in \$405,809.23 were not calibrated to strike only a "remedial" blow at traceable "proceeds" of specific crimes, but indiscriminately confiscated all of respondents' valuable assets under an amalgam of forfeiture statutes — a clear signal that the forfeitures operated to punish respondents for their crimes. 33 F.3d at 1220 n.11.

No fair reading of the history of modern forfeiture statutes can portray the principal purpose of the statutes at issue here as anything but punitive. At the very least, the history shows that these statutes are not "solely remedial." Moreover, like the forfeitures found punitive in Austin, the forfeitures here are closely linked to (and indeed depend upon) the commission of crimes by respondents, and are based on statutes that focus on culpability by providing an innocent owner defense. The goal of these statutes is not to promote public safety by removing contraband or dangerous instrumentalities from circulation, or to abate nuisances. It is to take the profit out of crime, by stripping criminals of their ill-gotten gains. This is unquestionably a legitimate and desirable goal for Congress to pursue; but it is a punitive goal. As such, it should be subject to the limitations imposed by the Constitution on the power to punish.

- II. THE DOUBLE JEOPARDY CLAUSE PRO-HIBITS THE GOVERNMENT FROM SEEK-ING IMPOSITION OF PUNISHMENT IN SEP-ARATE CIVIL FORFEITURE AND CRIMI-NAL PROCEEDINGS BASED ON THE SAME OFFENSE
 - A. This Court's Precedents And The Fifth Amendment Itself Establish That The Double Jeopardy Clause Prohibits Multiple Punitive Proceedings, Not Only Multiple Prosecutions

In Abbate v. United States, 359 U.S. 187, 198-99 (1959), this Court explained:

The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Respondents Ursery, Arlt and Wren suffered precisely the harms the Double Jeopardy Clause seeks to prevent: they were required to "run the gauntlet" more than once for the same offense, "thereby subjecting [them] to embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 190 (1957). They also confronted two different judges and two different triers of fact in the repeated attempts to punish them.¹¹

Two different judges presided over the parallel civil and criminal proceedings below, see Ursery, 59 F.3d at 569-70; \$405,809.23, 33 F.3d at (continued...)

The Double Jeopardy Clause does not provide that an individual may not be "prosecuted" twice, as the government argues. Brief of the United States at 16-36, but that an individual shall not be "subject for the same offence to be put twice in jeopardy of life or limb." U.S. Const. amend. V. As argued in Point I, supra, Halper and Kurth Ranch establish that "jeopardy" refers to risk of any punitive governmental action, and not just "criminal" punishment within the meaning of the Kennedy/Ward test. See n.2, supra. As long ago as Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874), this Court refused to read the apparently limiting "life or limb" language as restricting the scope of the Double Jeopardy Clause's prohibition of multiple punishments. So long as the Clause applies to modern punishments like incarceration and fines at all, its reach must extend to "civil" imposition of these sanctions, as Halper held.

This Court's interpretation is supported by the structure of the Bill of Rights. Had the framers of the Double Jeopardy Clause wished to limit the sweep of that provision, they could have positioned the Clause in the Sixth Amendment, which governs only "criminal prosecutions," rather than in the Fifth Amendment, whose protections are not all so limited.¹² Forfeiture proceedings may not command

Sixth Amendment-based criminal procedures under the Kennedy/Ward test, but this Court has consistently applied constitutional guarantees outside the Sixth Amendment to these "quasi-criminal" proceedings. See, e.g., One 1958 Plymouth Sedan, 380 U.S. 693 (Fourth Amendment exclusionary rule); Austin, 113 S.Ct. at 2804 n.4 (Eighth Amendment Excessive Fines Clause); Good, 114 S.Ct. at 504 (Due Process Clause guarantees of notice and opportunity to be heard).

The dicta on which the government relies for the proposition that a "prosecution" is a prerequisite to double jeopardy protection, Brief of the United States at 17, not surprisingly, predate the decisions in Halper, Austin and Kurth Ranch. In these earlier decisions, the Court had assumed that the evils the Double Jeopardy Clause deplores could only take place if the government (1) brought successive criminal prosecutions, or (2) either exceeded the legislatively prescribed punishment or acted vindictively in a particular case. See Halper, 490 U.S. at 440. Halper can be described as supplementing this list in order to prevent prosecutors and legislatures from inflicting the harms the Double Jeopardy Clause has always prohibited through innovative use of "civil" proceedings. After Halper, it no longer makes sense to say that the Double Jeopardy Clause prevents the

^{11 (...}continued)

^{1216.} Had the forfeiture proceedings gone to trial (instead of being settled in *Ursery* and decided on summary judgment in \$405,809.23), respondents would have confronted a second round of jury selection and decision. One central purpose of the Double Jeopardy Clause is to protect a defendant's Sixth Amendment right to jury trial by respecting the finality of jury verdicts and not allowing the government a second attempt to select a congenial trier of fact. See Peter Westen & Richard Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup.Ct. Rev. 81, 122-32.

Each clause of the Fifth Amendment declares the extent of its own ap-(continued...)

^{12 (...}continued)

plicability. The right to indictment by grand jury is, of course, limited by its own explicit terms to criminal cases; the Takings Clause and Due Process Clause just as clearly are not.

The privilege against self-incrimination includes apparently limiting language ("nor shall be compelled in any criminal case to be a witness against himself") (emphasis added). Nevertheless, because the damage the privilege aims to prevent may flow from a civil proceeding, this Court has held that the privilege may also be invoked during a civil proceeding, including a civil forfeiture proceeding, by a person seeking to avoid "incrimination." See United States v. United States Coin & Currency, 401 U.S. at 721-22; Boyd, 116 U.S. at 634.

discrete injuries of multiple prosecutions or multiple punishments. Multiple punitive proceedings are prohibited, even if they do not precisely fit one of the two prongs of the previous dicta.

History does not justify discarding the unanimous conclusions of Halper and Austin. Even if the framers of the Constitution had been willing to countenance some successive forfeiture and criminal proceedings concerning traditional subjects of common law forfeiture, the modern narcotics and money laundering forfeiture statutes at issue here bear little resemblance to common law forfeiture. See Point I, supra. Congress may indeed avoid the strictures of criminal procedure by creating civil forfeiture as a weapon, but if a prosecutor chooses to use this weapon in addition to criminal penalties, that prosecutor must respect not only the Eighth Amendment restriction on excessive punishment, but also the Fifth Amendment prohibition of multiple punitive proceedings. The limitation is not directed at the legislature so much as at the prosecutor.

Whether Congress itself intended to authorize successive forfeiture and criminal proceedings is not relevant to double jeopardy analysis. Congress is certainly entitled to deference when it defines what constitutes an "offense," see Missouri v. Hunter, 459 U.S. 359 (1983), and may, by defining separate offenses, afford prosecutors the discretion to bring

even successive criminal prosecutions. See United States v. Dixon, 509 U.S. __, 113 S.Ct. 2849 (1993). However, Congress may no more decide to allow prosecutors to bring multiple punitive proceedings for what it has already defined as the "same offense," see United States v. 9844 South Titan Court, 75 F.3d 1470, 1490-91 (10th Cir. 1996); Elizabeth Lear, "Contemplating the Successive Prosecution Phenomenon in the Federal System," 85 J.Crim.L. & Criminology 625, 628 n.18 (1995), than it may unilaterally declare that its actions are not "punitive." **

Like its approach to the question of what constitutes.

Like its approach to the question of what constitutes punishment, the government proposes that the Court also limit itself here to a narrow case-by-case approach restricted to asking whether government actors in these particular cases were "vindictive" in pursuing multiple punitive proceedings. Brief of the United States at 27. But vindictiveness is not the only, or even the principal danger posed when the government has a quiver full of methods of seeking punishment. Regardless of the purity of their motives, if government attorneys are permitted to seek otherwise allowable penalties independently and sequentially, they may thereby exhaust a property owner's resources and will, and consequently increase the risk of punishing the innocent.

This potential for abuse is inherent in all instances where the government seeks forfeiture and criminal penalties

by unfair procedures is not a sufficient reason for the courts to refuse to measure those proceedings against our current constitutional definitions of fairness. In Good, Justice O'Connor agreed that the Court must use modern due process calculus in evaluating the constitutionality of the procedures of civil forfeiture "notwithstanding its historical pedigree." 114 S.Ct. at 513 (concurring in part and dissenting in part). See also id. at 515 (Thomas, J.)("it may be necessary — in an appropriate case — to reevaluate our generally deferential approach to legislative judgments in this area").

The Court has recognized in many other areas that, while deference to the legislature plays an important role in some aspects of constitutional interpretation, under fundamental principles of judicial review, the legislature cannot be given the final power to decide when constitutional guarantees apply. In the procedural due process area, for example, legislatures may decide whether or not to create entitlements to liberty or property, but the courts must then decide what process is due to protect whatever entitlements the legislature creates. The legislature may not choose what procedures will apply. See, e.g., Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985).

in parallel proceedings. See David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES at 10.01 (1994); Mary M. Cheh, "Constitutional Limitations on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," 42 Hastings L.J. 1325, 1389-98 (1991). The government has vast power to use sequencing of the two proceedings in whatever way will most disadvantage the defendant/ claimant, who does not even have the benefit of a constitutional right to counsel in connection with the forfeiture proceeding. See Smith, supra, at 11.0. In forfeiture proceedings under §881 and other statutes, the government may conduct discovery against the defendant/claimant, who may assert the privilege against self-incrimination only to find that he has lost his property as the price of defending his liberty. See Cheh, supra, at 1384-89. The government may litigate the forfeiture action first if it wishes to strip a prospective defendant of assets to hire criminal defense counsel, see Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617 (1989), or may stay the forfeiture action if it prefers to avoid having to respond to the claimant's reciprocal discovery requests, see 21 U.S.C. §881(1). If the defendant is convicted in the criminal action, the government may move for summary judgment, as it did in \$405,089.23; if the defendant is acquitted, the government may proceed with the forfeiture action nevertheless, under cover of the different burdens of proof involved. 89 Firearms, 465 U.S. at 366. Because two different prosecutors, often from different offices, represent the government in the parallel proceedings, see Ursery, 59 F.3d at 575, claimant/defendants are unlikely to be able to "once and for all . . . conclude their confrontation with society," United States v. Jorn, 400 U.S. 470, 486 (1971), at the time of the jury's verdict. Like respondents Arlt and Wren, they may find themselves defending their property for a full year or more after resolution of their criminal case, see 33 F.3d at 1214. Respondents Ursery, Arlt and Wren did not even have the benefit of having the same judge presiding over the interplay of the parallel proceedings to ensure that the government did not abuse its unilateral powers, see Ursery, 59 F.3d at 569-70; \$405,809.23, 33 F.3d at 1216. Successive proceedings also increase the danger that, although innocent, a defendant might be punished nevertheless, because the government has the opportunity to rehearse its case and to use what it learns from the defense in the first proceeding to win the second.

Virtually every federal court of appeals to have examined the question has agreed with the Sixth and Ninth Circuits that permitting the government to separately pursue criminal penalties and civil forfeiture penalties amounting to "punishment" violates the Double Jeopardy Clause. See United States v. 9844 South Titan Court, 75 F.3d at 1482-86 (10th Cir.); United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S.Ct. 669 (1994); United States v. Tilley, 18 F.3d 295, 297 (5th Cir.), cert. denied, 115 S.Ct. 574 (1994); United States v. One Single Family Residence Located at 18755 North Bay Road, Miami, 13 F.3d 1493 (11th Cir. 1994); United States v. Millan, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S.Ct. 922 (1994). Because the gravamen of the violation is that the government gives itself two bites of the apple, the relative timing of the two proceedings cannot determine whether there has been a double jeopardy violation.15 Therefore, because the forfeiture proceedings in these cases were punitive, the government was not permitted to pursue multiple proceedings if both proceedings involved the "same offense."

¹³ See Kurth Ranch, 114 S.Ct. at 1958 (Scalia, J. dissenting); Brown v. Ohio, 432 U.S. 161, 168 (1977). When jeopardy attached in each proceeding only matters with respect to deciding which of the two parallel proceedings must be vacated, but not to whether one or the other must be.

B. The Civil Forfeiture Actions And The Criminal Prosecutions In These Cases Are Proceedings Punishing The "Same Offense"

In both cases below, the government sought a punitive forfeiture of property belonging to criminal defendants in a parallel civil proceeding based on all or substantially all of the same conduct prosecuted in the respective criminal cases. Because forfeitures are not usually classified as "offenses," see Libretti v. United States, _ U.S. _, 116 S.Ct. 356 (1996), in that they define forms of punishment rather than criminal conduct, the Tenth Circuit has suggested that Double Jeopardy analysis should take a different form in parallel proceeding cases. 9844 South Titan Court, 75 F.3d at 1488-89. The classic Blockburger test measuring when two "offenses" are covered by the Double Jeopardy Clause -- "whether each provision requires proof of a fact which the other does not," Dixon, 113 S.Ct. at 2856, quoting Blockburger v. United States, 284 U.S. 299, 304 (1932) -can nevertheless be applied here. Once again, labels like "offense" are less significant than the purposes of the constitutional guarantee at issue.

As demonstrated in Dixon, the Blockburger test requires an abstract comparison of the elements of the distinct offenses. In Dixon, the Court also confirmed that, as in Harris v. Oklahoma, 433 U.S. 682 (1977)(per curiam), a sanction imposed for violating one crime through the commission of an incorporated offense can be barred by double jeopardy "even without specifying the latter's elements." Grady v. Corbin, 495 U.S. 508, 528 (1990)(Scalia, J., dissenting); Dixon, 113 S.Ct. at 2857. The Court in Harris examined a felony-murder statute that did not necessarily include the particular separately charged predicate felony because its language permitted any number of felonies to qualify as the predicate offense. In Dixon, the criminal con-

tempt statute the Court reviewed essentially incorporated the entire penal code.

The forfeiture statutes at issue here speak in terms of "violations of this subchapter," 21 U.S.C. §§881(a)(6) and (7), or "involved in violations" of specific provisions of title 18, 18 U.S.C. §981(a)(1)(A). As in *Harris* and *Dixon*, these forfeiture statutes subsume the underlying criminal charges so that forfeiture cannot be ordered without proof of the underlying criminal offense. None of the federal courts of appeals to have considered the question disagrees with the Sixth and Ninth Circuits on this point either. See, e.g., 9844 South Titan Court, 75 F.3d at 1489-90 (10th Cir.); Tilley, 18 F.3d at 297-98 (5th Cir.); One Single Family Residence, 13 F.3d at 1495 (11th Cir.). 16

Some forfeitures will survive the *Blockburger* test -- if the forfeiture complaint alleges different crimes than those for which defendant was prosecuted, if an owner has allegedly intended to use property in connection with an offense but has not yet committed or attempted that offense, or if the owner is simply not being prosecuted and therefore has no double jeopardy problem. In both of the cases before the Court, however, the criminal defendant and the claimant were identical, all or at least some of the indicted crimes served as the predicate offenses for the forfeiture, and the only additional element required to be proven related to the role of the property in the offense.

The government's mode of proceeding in parallel forfeiture/criminal cases highlights the interlocking relationship of proceedings based on the same underlying substantive offenses. Following the conviction of respondents Arlt and Wren, the government moved for summary judgment in its forfeiture action. 33 F.3d at 1214. In some cases, the government incorporates the actual criminal indictment by reference in the civil forfeiture complaint. See, e.g., Millan, 2 F.3d at 18.

C. Criminal Punishment And The Punitive Forfeitures Sought In These Cases May Both Be Imposed Only During The Same Proceeding, With The Same Judge Presiding And The Same Trier Of Fact

The Sixth Circuit was clearly correct in ruling that the government's failure to seek the available punishments in a "single coordinated proceeding" led to a double jeopardy violation. The Ninth Circuit was also correct in observing that the government could have avoided this problem by seeking criminal forfeiture under the criminal indictment. 33 F.3d at 1216-17. While amicus believes that it would be preferable for the government to have utilized criminal forfeiture in these cases, this Court need not decide in the context of this case whether to agree with the Ninth Circuit that the government is always required to choose between civil forfeiture and criminal prosecution.

It may indeed be possible for a civil forfeiture proceeding and a criminal prosecution to be joined in the same proceeding, as the Sixth Circuit believed, 59 F.3d at 575, see, e.g., United States v. Certain Real Property, 972 F.2d 136 (6th Cir. 1992); United States v. Real Property, 816 F.Supp. 1077, 1085 (E.D.Va. 1993), as long as the two proceedings are assigned to the same judge and provide the defendant

The notion of the Second and Eleventh Circuits that double jeopardy problems can be avoided if, although separate, the civil and criminal proceedings are "coordinated," see Millan, 2 F.3d at 20; One Single Family Residence, 13 F.3d at 1499, flies in the face of language and logic. The proceedings are still separate, with separate judges, fact-finders, and opportunities to undermine the defense. As the Tenth Circuit has recognized, 9844 South Titan Court, 75 F.3d at 1487-88, coordinating these separate proceedings may only increase the pressure on some of the values the Double Jeopardy Clause protects by allowing one government attorney to take full advantage of the accumulated knowledge and procedural finesse of the other.

the possibility of having both issues tried before the same trier of fact (presumably in a bifurcated verdict procedure like that used in criminal forfeitures, see Smith, supra, at 11-14, 14-35 - 38.2). The principal question would then be whether the government must relinquish the advantage of whatever lower burden of proof is permissible in civil proceedings when it decides to prosecute the same conduct.

In a joint proceeding, moreover, the Due Process Clause might limit the government's use of some of the favorable procedures (such as discovery) attached to civil forfeiture. But, the Court can and should allow Congress to decide whether it wishes to provide for such joint proceedings and how to structure them before addressing constitutional questions not raised by these cases.

Finally, the state amici argue that application of double jeopardy principles to the states would be burdensome. See Brief Amicus Curiae of the State of Connecticut, et al. But state legislatures would continue to have the same generous options that Congress has: they may use criminal instead of civil forfeiture when they intend to punish; they may provide for combined civil forfeiture/criminal proceedings; or they may craft forfeiture statutes limited to remedial goals (which could then be brought separately). The only thing that they may not do is to punish what they themselves have defined as the same offense, serving what they themselves have structured as punitive goals, in two separate proceedings. The Double Jeopardy Clause demands no less.

CONCLUSION

For the reasons stated above, the judgments below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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V.

GUY JEROME URSERY.

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FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23) IN UNITED STATES CURRENCY, Et Al.,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS 1

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation

All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

with a membership of more than 9,000 attorneys and 30,000 affiliate members, including representatives from every state. The American Bar Association awards NACDL full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

In its past several terms, this Court has reviewed a substantial number of forfeiture cases. In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the government's increasingly aggressive use of the forfeiture weapon. The cases at bar provide the Court with an opportunity to correct what has become a pervasive government practice: advancing the policies of criminal prosecution through civil forfeitures. Thus, NACDL has a vital interest in the outcome of these cases, and urges the Court to affirm the decisions below.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments (and attempts to punish) for the same offense. *United States v. Halper*, 109

S.Ct. 1892 (1989). A civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. *Id.* at 448. For double jeopardy analysis, the order of punishment does not make a difference.

The government's argument that the civil forfeiture statutes in the cases at bar do not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. Austin v. United States, 113 S.Ct. 2801 (1993).

Among the relevant inquiries for double jeopardy purposes is whether the government's conduct constitutes oppression of the sort against which the Double Jeopardy Clause was intended to protect. Despite the importance of private property as a "concomitant to liberty," few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding, especially when that proceeding occurs while the possibility, or actuality, of a criminal prosecution based upon the same violation looms. The government enjoys tremendous strategic and procedural advantages in such situations. For example, people are often forced to defend against civil forfeiture without benefit of counsel, either because they were indigent to begin with, or because the government has rendered them indigent through seizure of their assets. Thus, claimants are often left in the procedural posture of defending against the government with one, if not both, hand(s) tied behind their back.

By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions below promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

In order to analyze and decide the issues presented in these consolidated appeals, the Court must first examine the nature of the rights at stake. In determining whether forfeiture of property is punitive, and whether the Double Jeopardy Clause protects against multiple attempts to punish for the same violation of law through both criminal prosecution and forfeiture of property in separate proceedings, a brief review of the importance of property rights in our society is indispensable to a resolution of the issues before the Court.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has been widely recognized. "The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government." United States v. \$12,390.00, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). See John Locke, The Second Treatise on Civil Government, ¶¶ 123-42.2 Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty

and the personal right in property. Neither could have meaning without the other." Lynch v. Household Finance Corp., 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972); Likewise, as recently observed by this Court, "[i]ndividual freedom finds tangible expression in property rights." United States v. James Daniel Good Real Property, 114 S.Ct. 492, 505 (1993).

The nature and quality of a citizen's freedom and security relates directly to his or her ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236, 41 L.Ed. 979, 17 S.Ct. 581 (1897); see also Charles A. Reich, The New Property, 73 YALE L.J. 733, 771-74 (1964) (asserting that a person's freedom and security depend on his ability to protect his property from irrational government interference); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

II. THE DOUBLE JEOPARDY CLAUSE PROTECTS AGAINST MULTIPLE PUNISHMENTS AS WELL AS SUCCESSIVE PROSECUTIONS.

It has long been held that the Double Jeopardy Clause of the federal constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.³ Ex Parte Lange, 18 Wall. 163, 168, 21 L.Ed. 872 (1873) ("If there is

The Founders understood that private property was a fundamental aspect of personal liberty and, moreover, a major goal of the Revolution itself. In the Declaration of Independence, Jefferson, borrowing from John Locke, asserted that the goals of the nation were "life, liberty, and the pursuit of happiness." Locke's language, of course, had been "life, liberty, and property." Jefferson rightly understood that property was a part of both liberty and the fundamental happiness of the people. The demand for a Bill of Rights naturally included the demand for the protection of property, which the Founders regarded as "the guardian of every other right." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

The Double Jeopardy Clause protects not only against multiple punishments, but also-perhaps especially-against multiple attempts to punish ("[n]or shall one be twice put in jeopardy.") See, Witte v. United States, 115 S.Ct. 2199, 2205 (1995).

anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense"). See also, North Carolina v. Pearce, 395 U.S. 711, 727, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969) (Douglas, J., dissenting) ("The theory of Double Jeopardy is that a person need run the gantlet only once. The gantlet is the risk of punishment which the State or Federal Government imposes for that particular conduct."); United States v. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The underlying idea is that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for the same offense, thereby subjecting an individual "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-88, 2 L.Ed.2d 199, 78 S.Ct. 547 (1971). "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." *Id.* at 198.

Thus, despite recent concerns expressed by some members of the Court, the protection against multiple punishments "has deep roots in our history and jurisprudence," *Halper*, supra, 490 U.S. at 440, and is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." See, e.g., Bennis v. Michigan, ___ S.Ct. ___, ___, 1996 WL 88269 at *7 (1996), quoting) J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511, 65 L.Ed.2d

376, 41 S.Ct. 189 (1921 (discussing another long-standing principle).

Apparently recognizing that this Court is not likely to overrule Halper, the government attempts to severely narrow Halper's holding by arguing that the protection against multiple punishments can arise only after a criminal prosecution. The government's argument is devoid of merit. Nothing in Halper suggests such a narrow interpretation. Halper framed "the sole issue before it" as "whether the statutory penalty authorized by the civil False Claims Act, under which Halper is subject to liability of \$130,000 for false claims amounting to \$585, constitutes a second 'punishment' for the purpose of double jeopardy analysis." Halper, 490 U.S. at 441. Similarly, the Court observed that "Ithe notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purpose of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." Id., at 448.

The government's argument rests, at bottom, on a single sentence in the *Halper* opinion: "We therefore hold that under the Double Jeopardy Clause, a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, at 448-49 (emphasis supplied). That sentence, however, merely identifies the factual context of the case before the Court. There is no discussion or analysis anywhere in the Court's opinion of the need for a prior criminal prosecution to trigger double jeopardy analysis. Indeed, the Court did not limit its holding

See, Kurth Ranch, supra, 114 S.Ct. at 1955-59 (Scalia, J., joined by Thomas, J., dissenting); Witte, supra, 115 S.Ct. at 2209-10 (1995) (Scalia, J., joined by Thomas, J., concurring).

only to punishments which follow criminal prosecutions, and even left open the notion that double jeopardy could bar multiple *civil* punishments: "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been *punished* for the same conduct, even if the civil sanction imposed is punitive." *Id.*, at 450. Significantly, the Court did not equate punishment with criminal prosecution. Rather, it squarely rejected that analogy. *Id.* at 448.

The government's assertion that the order of proceedings should make any constitutional difference is not based on reasoning or analysis, but merely the government's hope that Halper can be narrowly limited to its facts. However, every circuit court has recognized that there is no principled basis for so limiting Halper's double jeopardy reasoning. Common sense dictates that regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and the second sanctions are deemed punishment. As recently observed by Justice Scalia, "[i]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." Kurth Ranch, supra, 14 S.Ct. at 1957 (Scalia, J., dissenting), citing United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991), cert. denied, 113 S.Ct. 123 (1992).5

Nevertheless, the government presses its argument that for double jeopardy purposes, it is irrelevant how severely a person is punished so long as that punishment is meted out prior to a criminal prosecution. But *Halper* itself provides the clearest example of why the order of punishment cannot possibly make any difference. Under the government's reasoning, the government would have been free to exact the full measure of the civil penalty against Halper (more than \$130,000 based upon Halper's overcharges in the sum of \$535) and criminally prosecute him for the same conduct without running afoul of the Double Jeopardy Clause, so long as the civil penalty preceded the criminal prosecution. This cannot be right. Indeed, as discussed, infra at pp. 23-26, being subjected to a civil forfeiture proceeding prior to a criminal prosecution can be even more oppressive than the reverse.

III. CIVIL FORFEITURES PURSUANT TO 21 U.S.C. §881 CONSTITUTE PUNISHMENT.

A civil statute inflicting a monetary penalty can be sufficiently punitive that its use against a citizen operates as a bar to subsequent governmental attempts to punish.⁶ Moreover,

⁵ See also, United States v. Morgan, 51 F.3d 1105 (2nd Cir. 1995); United States v. Williams, 56 F.3d 63 (4th Cir. 1995); United States v. Tilley, 18 F.3d 295, 298, n. 5 (5th Cir. 1994); United States v. Austin, 54 F.3d 394, 399 (7th Cir. 1995); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990); United States v. Meyers, 897 F.2d 1126, 1127 (11th Cir. 1990), cert. denied, 498 U.S. 865 (1990).

In Halper, this Court held that a civil sanction constituting punishment may not be imposed following a criminal prosecution based on the same offense without contravening double jeopardy protection against multiple punishments. The Court then turned to the question of whether, and under what circumstances, a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. Rejecting the argument that only proceedings which are essentially criminal can result in punishment, the Court held that whether a nominally civil sanction is sufficiently punitive cannot be determined solely by statutory interpretation. The Court observed that "the labels 'criminal' and 'civil' are not of paramount importance," 490 U.S. 447, and concluded:

[[]I]t follows from these premises that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or

this Court has previously held that at least some of the civil forfeiture statutes at issue here (21 U.S.C. §881(a)(4) and (a)(7)) constitute punishment.⁷

In light of the historical understanding of forfeiture as punishment, the clear focus of §§881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense.

Austin v. United States, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801, 2812 (1993). Every federal circuit court of appeal to have considered the issue, post Austin, has agreed that these statutes impose punishment for purposes of double jeopardy analysis.⁸

The government's argument that the civil forfeiture statutes in the cases at bar did not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. First, the

government repeatedly refers not to civil forfeiture statutes, but to statutes that are pervasively punitive or solely remedial. Second, the government argues that it is only in "a rare case" that a forfeiture would constitute punishment. In Austin, however, this Court applied Halper's reasoning to a forfeiture case involving a typical drug trafficking offense rather than a small-gauge money-penalty. See, generally, S. Cox, Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep, 39 St. Louis Univ. L.J. 1235, 1249-50 (March 1996). As Professor Cox observes, "If anything, the Austin Court seemed to indicate that presumptions in favor of upholding a civil penalty as a nonpunishment would more likely apply in the fixed-penalty context rather than in other situations." Ibid. Indeed. distinguishing civil forfeiture statutes from the fixed-penalty provisions in Halper, this Court in Austin observed:

In Halper, we focused on "the sanction as applied in the individual case. . . In this case, however, it makes sense to focus on [the forfeiture statute] as a whole. Halper involved a small, fixed-penalty provision, which in the ordinary case . . . can be said to do no more than make the government whole." The value of the conveyances and real property forfeitable under Sections 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.

deterrent purposes, is punishment, as we have come to understand the term.

⁴⁹⁰ U.S. at 448.

We also agree with Respondents Arlt and Wren, for the reasons expressed in their brief, that forfeitures pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1) constitute punishment.

In addition to the Sixth and Ninth Circuits in the cases at bar, see United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995), cert. denied, 116 S.Ct. 909 (1996); United States v. Perez, 70 F.3d 345 (5th Cir. 1995); United States v. Torres, 28 F.3d 1463 (7th Cir), cert. denied, 115 S.Ct. 669 (1994); United States v. 9844 S. Titan Court, ___ F.3d ___, 1996 WL 49002 (10th Cir. 1996).

This Court in Austin emphasized the following language from Halper in rejecting government claims that forfeiture's remedial purposes meant it could not be considered punishment: "[A] civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 113 S.Ct. at 2812 (emphasis added in Austin) (quoting Halper, 490 U.S. at 448).

Austin, 113 S.Ct. at 2812, n.14 (citations omitted) (quoting Halper, 490 U.S. at 448, 449). See, Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 U. Pa. L. Rev. 101 (1995).

The government's argument completely ignores Austin's finding that civil forfeiture is highly punitive (unlike graduated civil money penalties). Moreover, the government mistakenly equates fines cases with forfeiture cases ("The holding of Halper requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection." Pet. Brief at 13). However, what Halper held was much narrower than that. Halper held that where a statute is designed to estimate liquidated damages, it will be the rare case in which sanctions applied pursuant to the statute do not approximate liquidated damages. Conversely, where, as here, the statutes

are not designed to estimate liquidated damages, it will not be "the rare case" in which one is placed in jeopardy of punishment pursuant to the statutes. See, King, Portioning Punishment, supra, at 171 ("For instance, it made sense for the Court in Halper to compare the sanction there to the government loss — the penalty provisions of the False Claims Act were calibrated to actual losses caused by the defendant's culpable acts. But other sanctions, like those in Austin, are set without reference to government loss.").

As the Court in Austin observed, it would not be "fair" to characterize 21 U.S.C. §881(a)(4) and (a)(7), providing for forfeiture of conveyances and real estate that have "facilitated" narcotics activity, as serving a remedial purpose. Austin, 113 S.Ct. at 2812 and n.14. A judge or prosecutor cannot strip punishment of its punitive character simply by offering an after-the-fact accounting of the government's costs of investigating and prosecuting crime that arguably justify a particular penalty under the statute, because the test is one of legislative purpose as well as punitive effect.12 Accordingly, the Court in Austin correctly refused to compare the value of the Austins' forfeited assets with the government's costs in order to determine whether the forfeiture was punishment. Just as a criminal fine does not become remedial simply because its amount happens to resemble government losses, the forfeiture of an asset under a punitive statute does

We agree that the government is entitled to bring truly remedial actions in addition to criminal penalties. Moreover, given the difficulty of accurately measuring the government's loss from a given act, there can be some leeway. As this Court noted in Halper, at 446, "the Government... may demand compensation according to somewhat imprecise formulas, such as liquidated damages or a fixed sum plus double damages..." Thus, when the government makes a good-faith effort to estimate, by statute, the likely harms of the forbidden act, this Court is hesitant to find the effort suspect. But where, as here, the statutes do not even attempt to weigh the amount of the property owner's loss against the value of the harm the property owner caused (or is likely to cause), such a claim is without credibility. Such statutes can only be justified on the grounds that the property owner's conduct deserves to be punished.

The Court's holding follows necessarily from the premise: if reasonable liquidated damages are not punitive, then a statute seeking fines in the nature of liquidated damages will not generally be punitive. It will only be in the rare case, as in *Halper*, where a large number of small infractions are each penalized with fines amounting, in total, to almost 250 times the value of the government's loss, that an individual is punished by the operation of such fines.

The government does not dispute the importance of the purpose of the statute. "Under . . . Halper, the issue whether a particular civil sanction amounts to 'punishment' within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purpose. 490 U.S. at 448." Pet. Brief at 37. Nevertheless, the government concedes that civil forfeiture statutes were intended to have a "powerful deterrent" purpose, Pet. Brief at 43, n.11, citing Austin's reference to the legislative history of the drug forfeiture statutes. 113 S.Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)).

not cease to be punishment just because it happens to roughly equal the government's costs of detection and enforcement.

The government seeks to create a false dichotomy based on only two classes of cases: those which trigger the full panoply of criminal law protections, and those which receive no protections at all. Thus, the government argues, if a law is sufficiently penal to trigger double jeopardy protection, it must also trigger all other criminal protections. But as this Court's holdings make clear, that is not the case. Together, Halper and Austin create a three tiered hierarchy of civil sanctions: (1) sanctions that are not punitive, which require only the safeguards typically afforded to civil litigants; (2) punitive civil sanctions, which trigger constitutional limits on the multiplicity and severity of punishment; and (3) sanctions

that are essentially criminal, which activate all constitutional rights normally associated with criminal cases.

In Kurth Ranch, the Court followed the same categorical approach it followed in Austin. Six members of the Court explicitly agreed that Halper's fact-dependent method of determining whether the exaction is remedial or punitive "simply does not work in the case of a tax statute." Kurth Ranch, 114 S.Ct. at 1948 (Rehnquist, C.J., dissenting).

Only Justice O'Connor would have followed Halper's fact-dependent approach. 114 S.Ct. at 1952-55 (O'Connor, J., dissenting). Justice O'Connor observed that the Ninth Circuit had recognized that imposition of the drug tax on the Kurths' possession of marijuana would not be punishment if the sanction bore some rational relationship to "the staggering costs associated with fighting drug abuse in this country." 114 S.Ct. at 1954 (quoting *In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1993)). Justice O'Connor stated her view that Halper requires that

the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives. The burden then shifts to the government to justify the sanction with reference to the particular case.

114 S.Ct. at 1954.15

¹³ The government's assertion that the tax imposed in Kurth Ranch "may be best understood as falling into the long line of decisions, including Mitchell, Mendoza-Martinez and Ward, that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied" (Pet. Brief at 34) illustrates the fallacy of the government's argument. Halper rejected the Kennedy-Ward all-or-nothing approach to civil proceedings. "The unstated but important Halper implication is that to pretend that punishment is not administered in civil proceedings would eventually strain common sense and the concomitant credibility upon which our legal system must ultimately rest for support of the rightness of its pronouncements." Cox, Halper's Continuing Double Jeopardy Implications, supra, at 1247. Under Professor Cox's reading of Halper, the whole point of rejecting the Kennedy-Ward analysis for civil punishments is to make clear that civil proceedings which punish can trigger some constitutional protections without triggering all the constitutional protections associated with purely criminal prosecutions. Id. at 1248, n.9. Clearly, the Court did not hold that Montana's administrative drug tax proceeding triggered such constitutional protections.

¹⁴ See, Austin, 113 S.Ct. at 2805 ("Thus, the question is not, as the United States would have it, whether forfeiture under §§881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.").

¹⁵ Supra at Professor King (Portioning Punishment, supra, 176-77) observes:

[&]quot;Under Justice O'Connor's test in Kurth Ranch, the amount of government loss caused by any given wrong can be manipulated with so little effort that almost any sanction, it seems, can be explained as compensation. The test would classify as rough remedial justice any civil award against any defendant involved in drug activity, as long as the award does not exceed the defendant's fair share of not only the state's drug en-

This Court's rejection of the Halper case-by-case approach in Austin and Kurth Ranch is eminently logical. As Chief Justice Rehnquist explains, the case-by-case approach was adopted in Halper

because compensation for the Government's loss is the avowed purpose of a civil penalty statute. But here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead to either raise revenue, deter conduct, or both. Thus, despite Justice O'Connor's attempt to view this case through the *Halper* lens . . . the reasoning quite properly employed in *Halper* to decide whether the exaction was remedial or punitive simply does not work in the case of a tax statute.

Kurth Ranch, 114 S.Ct. at 1949-50 (citations omitted) (Rehnquist, C.J., dissenting). The Court majority adopted

forcement budget (past, present, and future) but also drug abuse education, deterrence, and treatment expenses. The State of Montana in its brief to the Court in Kurth Ranch noted that one study estimated that in 1980 that 'the total direct and indirect costs of drugs on society was almost 47 billion dollars.' It would be hard to come up with a dollar limit over which any drug-related forfeiture, tax, or other sanction becomes punitive under this theory.

Compensable harm must be limited to that caused by the defendant's particular conduct, not by the actions of others. A broad definition of harm that includes harm from others like the defendant, and foreseeable as well as actual harm, makes sense if the sanction was meant to deter conduct; deterrence looks forward, toward expected harm from all future violators. Conversely, compensation faces back in time and is actorspecific."

Chief Justice Rehnquist's reasoning on this point. 114 S.Ct. at 1948.

Like a tax statute, the purpose of a forfeiture statute is not to recover the "actual damages" or the costs incurred by the government as a result of the defendant's conduct. Kurth Ranch, 114 S.Ct. at 1948. Rather, the purpose of most forfeiture statutes, including the ones involved in these cases, is first and foremost punishment, i.e., deterrence and retribution. Austin, supra; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) (forfeiture serves "punitive and deterrent purposes" and "impos[es] an economic penalty").

The government also complains that the appellate courts' categorical approach deprives it of any opportunity to prove the magnitude of the losses it suffered from the claimants' drug trafficking activity. But the government suffers no "losses" or damages from drug activity — at least not in the same sense that it suffers a loss or actual damages when a contractor cheats the government. It is true that drug trafficking imposes enormous costs on society as a whole and that the Government spends billions of dollars on law enforcement and anti-drug programs. But those general social and governmental costs cannot be rationally accounted for in assessing whether a particular forfeiture imposes punishment. Kurth Ranch, 114 S.Ct at 1948; Austin, 113 S.Ct. at 2812 n.14 ("any relationship between the government's actual costs and the amount of the sanction is merely coincidental").

In the final analysis, the government's argument that forfeiture serves remedial purposes is undermined by the government's own words. As this Court recently observed in *James Daniel Good Real Property, supra*, the government "has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s]." 114 S.Ct. at 502. The Court further observed

The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target.

"... Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin, 180 (Aug. 15, 1990).

Id., 114 S.Ct. at 502, n.2. It should thus be clear to all that the government regards asset forfeiture as a substantial revenue enhancement program, not a remedial policy.

IV. A CIVIL FORFEITURE PROCEEDING HAS ALL OF THE OPPRESSIVE ASPECTS OF A CRIMINAL PROSECUTION, BUT AFFORDS FEW OF THE CONSTITUTIONAL PROTECTIONS.

The government concedes that "[t]he relevant inquiry [for double jeopardy purposes] is whether the government's conduct 'constitute[s] governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," Pet. Brief at 57-58 (internal quotation marks omitted). Few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding, 6 especially

when that proceeding occurs while the possibility of a criminal prosecution based upon the same violation looms. Indeed, even standing alone, civil forfeiture proceedings have long been recognized as among the most oppressive actions that can be brought by the government. As was written over two hundred years ago by pundits of the day

In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution [,] yet these are all of them civil causes. — These penalties, forfeitures and demands of public debts may be multiplied at the will and the pleasure of the government. — These modes of harassing the subject perhaps been

¹⁶ The abuse of civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and

popular publications. See, e.g., Hon. Henry J. Hyde, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?, CATO Institute (1995); Leonard L. Levy, A LICENSE TO STEAL, THE FORFEITURE OF PROPERTY, University of North Carolina Press (1996); T. Piety, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. MIAMI L.REV. 911 (1991); Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives, 42 HASTINGS L.J. 1325 (1991); 1994 Symposium: What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives, Mary M. Cheh, Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution, 39 NEW YORK L.SCH.L.R. 1; George Fishman, Civil Asset Forfeiture Reform: The Agenda Before Congress, 39 NEW YORK L.S.L.R. 121 (1994); Steven L. Kessler, For Want of a Nail: Forfeiture and the Bill of Rights, 39 NEW YORK L.SCH.L.R. 205 (1994); Anthony J. Franze, Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner, 70 NOTRE DAME L.REV. 369 (1994); Gordon, Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture, 44 DUKE L.J. 744 (1995); Bullock, Filling the Coffers With Civil Forfeitures, LEGAL TIMES, November 1, 1993; Brazil & Berry, Tainted Cash or Easy Money?, ORLANDO SENTINEL TRIBUNE, June 14-15, 1992; Schneider & Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, PITTSBURGH PRESS, August 11-September 6, 1991.

more effectual than direct criminal prosecutions. — Yet in the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures. — Yet all of these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government. — They fill the public coffers and enable the government to employ its minions at a cheap rate. They are a profitable kind of revenge.

Essays of an Old Whig, Philadelphia Independent Gazetteer, October, 1787 -- February, 1788 in 3 The Anti-Federalist Papers, Section 3.16. See also, The Honorable George C. Pratt & William B. Peterson, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991); United States v. All Assets of Statewide Auto Parts, Inc., etc., 971 F.2d 896, 905 (2nd Cir. 1992) ("[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

The Anti-Federalists based their campaign on ideas such as this. Indeed, it was to overcome such objections that the Bill of Rights was added. The debate as to whether to adopt the Bill of Rights was not over whether such rights existed or were important, but that the existence of such a list could be interpreted as excluding everything not specifically set forth therein, thereby inadvertently allowing rights to be trampled on.

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure.

Schwarz, THE BILL OF RIGHTS, Vol. II at 1031 (Speech by Madison on June 8, 1789 in presenting proposed Bill of Rights to Congress).

This Court in Green v. United States, supra, observed that the Double Jeopardy Clause reflected the principle that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for an alleged offense, thereby subjecting him "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . " 355 U.S. at 187-88. Similarly, the Court in North Carolina v. Pearce, supra, held that the theory of double jeopardy is that a person should not be required to run the gauntlet more than once. 395 U.S. at 727. Yet, this is precisely what occurs when one is subjected to separate proceedings involving civil forfeiture and criminal prosecution.18 Respondents were no less oppressed by the additional embarrassment, expense, ordeal, and anxiety because the forfeiture proceedings were civil rather than criminal; and they were forced to "run the gauntlet" more than once.

For double jeopardy purposes, the order in which the proceedings take place simply does not matter. A civil forfei-

For example, in a recent case in the Southern District of Florida, after convicting CenTrust CEO David Paul for various criminal violations arising out of the mismanagement of CenTrust Savings Bank, the government initiated a civil proceeding based on the same conduct. The criminal proceeding exhausted the defendant's resources, and during the criminal case he suffered near fatal heart problems. Because he has no more resources with which to hire counsel in the civil proceeding, he is forced to represent himself, with all the attendant disadvantages, and is laboring under the additional burden of having to conduct this defense from a prison cell. See Doris, David Paul's CenTrust Saga Continues, DAILY BUS. REV. (Mon., Feb. 12, 1996) ("Now he describes himself as 'indigent' and 'broke,' a lone David who has a law degree but who never practiced, fending off a goliath of a government team comprising more than a half dozen lawyers.").

ture proceeding following a criminal prosecution for the same violation, and vice versa, will trigger the double jeopardy bar. As the Ninth Circuit observed below (where the civil forfeiture followed the criminal prosecution after having been stayed during the pendency of the prosecution), "such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing the individual to 'run the gantlet' more than once." 33 F.3d at 1217. Similarly, in another recent case where the forfeiture proceeding followed a criminal prosecution, the Tenth Circuit observed, "[t]he practice of instituting multiple proceedings against a single defendant, which the government benignly terms a 'coordinated law-enforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him." United States v. 9844 South Titan Court, supra, 1996 WL 49002 at *14 (citations omitted).

Commenting on situations where the civil forfeiture action and the criminal prosecution are ongoing at the same time (in separate proceedings), Professor Cox observes:

The harassment of multiple government prosecutions which seek punishment hardly disappears when both are going on at the same time. The defendant is as effectively, perhaps more effectively, whipsawed by the government's simultaneous two-bites-at-the apple approach as by a wait-and-see second attempt to prosecute. Simultaneous dual prosecutions involving different burdens of proof and different factfinders present a real threat of dual punishment, rather than only a hypothetical threat that the government might seek more in a second proceeding. As the Ninth Circuit correctly concluded, the government exacerbates rather than ob-

viates double jeopardy concerns when it tries to team up on the defendant in this way.

S. Cox, Halper's Continuing Double Jeopardy Implications, supra, at 1300 and n.193.

However, for the individual (such as Respondent Ursery) against whom the government first launches a civil forfeiture action while contemplating and investigating a criminal case, the oppression and opportunity for abuse is at its worst. In this situation, where the potential for criminal charges exists, not only is the defendant subjected to all of the evils of two proceedings condemned in *Green* and *Pearce*, but the possibility of a criminal prosecution forces a number of additional unpalatable choices. Indeed, this is where the "coordination" of two proceedings emerges as the most pernicious vice.

Discussing the advantages of civil forfeiture proceedings over criminal forfeitures, the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance training manual No. 1, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING, encourages broader and more aggressive use of the civil forfeiture statutes not only because of its advantage with respect to the standard and burden of proof, but also because

The claimant may be deposed and disclosure of his records compelled. . And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering question may have incriminating consequences in the criminal proceedings.

For these reasons, the civil claimant is in a very difficult position relative to his posture in a criminal trial. . . . This means that, even when tracing obstacles exist, forfeiture proceedings should be considered since the government may never be put to its proof.

U.S. Department of Justice, Asset Forfeiture training manual No. 1, November 1988, Addendum Added January 1992, "The Advantages of Civil Forfeiture," at 2 (emphasis supplied).

Several cases have held that the fact than an individual makes a claim to property in a forfeiture proceeding is admissible in a criminal case, and is not shielded by any Fifth Amendment privilege. Baker v. United States, 722 F.2d 517, 518-19 (9th Cir. 1983) (implying that there is no Fifth Amendment privilege shielding the filing of a claim for property that the government seizes for forfeiture, characterizing the Fifth Amendment claim as weak, and finding no constitutional impediment to the requirement that claimant incriminate himself to claim ownership of forfeitable property): United States v. Fifteen Thousand Five Hundred Dollars (\$15,500) in U.S. Currency, 558 F.2d 1359, 1360-61 (9th Cir. 1977) (similar). See, D. Smith, PROSECUTION AND DEFENSE OF FORFETTURE CASES, Matthew Bender (1995), &10.03, 10-39 to 10-41; Note, Constitutional Rights in Civil Forfeiture Actions, 88 COLUM. L. REV. 390.

If a property owner wants an opportunity to regain his property, he must first demonstrate an interest in the property sufficient to establish standing. However, by alleging an interest in the property, a claimant may also provide information that can be used against him by the state in a later criminal trial. A claimant may preserve his Fifth Amendment right only by not coming forward and alleging an interest in the property, resulting in the automatic forfeiture of the property.

Id. at 396-97. But see, United States v. Cretacci, 62 F.3d 307, 311 (9th Cir. 1995), petition for cert. pending (holding that "a defendant's claim of ownership of property that was subject to forfeiture may not be used [to incriminate the defendant in a criminal case]," relying on United States v. Simmons, 390 U.S. 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968)).

In addition to the obvious Fifth Amendment problems created by the government's "coordination" of separate civil forfeiture and criminal prosecutions, the government can, and often does, pauperize a person by seizing all of his or her assets, thereby preventing the person from retaining counsel in either the criminal prosecution or the civil forfeiture proceeding. Similarly, coordination of separate proceedings increases the risk that grand jury evidence will be used to bolster the civil case, that communication between prosecutors in the civil and criminal cases will ensure that various actions in each case will be timed so as to have the most

The property owner's predicament has always exceeded that facing other civil litigants who faced the possibility of a subsequent criminal prosecution, because the claimant in most federal forfeiture proceedings has the burden of proof to show why his property is not subject to forfeiture. See, e.g., 21 U.S.C. §881(d) (incorporating burden of proof provisions of 19 U.S.C. §1615). However, with the threat of a criminal indictment, the government can inhibit a claimant's ability to defend the forfeiture by inhibiting his or her ability to testify. See, e.g., United States v. United States Currency, 626 F.2d 11, 14-15 (6th Cir. 1980). Because of the burden of proof the Claimant's Fifth Amendment right to remain silent is effectively purchased at the cost of his property. Thus civil forfeiture can be used to extort forfeitures of property that would probably not occur were the proceedings brought in reverse order.

coercive and oppressive effect, and that discovery will be obtained for the civil case through grand jury subpoena or search warrants obtained in the criminal case. See, Robert G. McCampbell, Parallel Civil and Criminal Proceedings: Six Legal Pitfalls, 31 CRIM. LAW BULL. 483 (1996). All of these actions upset the fundamental notions of fairness with which the Framers were concerned in constructing a Bill of Rights.

V. THE DECISIONS BELOW PROMOTE THE TWIN GOALS OF FAIRNESS AND JUDICIAL EFFICIENCY.

Although the government and amici supporting the government's position express apprehension about the effect of the decisions below, those concerns are greatly exaggerated. By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions will promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes such as 18 U.S.C. §982 and 21 U.S.C. §853, which include forfeiture provisions for a wide array of criminal offenses.30 The government has already adapted to these decisions with a minimum of difficulty. Indeed, as one district court recently observed "[t]he single-proceeding approach is now followed in this district and elsewhere . . ." United States v. McCaslin, 863 F.Supp. 1299, 1307 (W.D.Wash. 1994). Prosecutors are also now routinely requiring express waivers of double jeopardy rights in plea agreements. Counsel have also been advised that the Department of Justice is seeking legislation specifically authorizing civil forfeiture cases to be joined for trial with related criminal prosecutions.²¹

To the extent that Austin, Kurth Ranch, and the decisions below require prosecutors to pursue criminal forfeitures as part of a single prosecution instead of relying upon separate civil forfeiture proceedings, this development will strongly promote fairness as well as judicial economy. The tactical advantages enjoyed by prosecutors in civil forfeiture proceedings have been well documented. See, e.g., note 16, supra. See also, 1 D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 12.10[2], 12-150 (1995):

Prosecutors enjoy tremendous procedural advantages in civil forfeiture cases. They frequently win because of procedural defaults by claimants or simply because the claimant's funds to pay counsel are soon exhausted — assuming that the claimant has the financial wherewithal to retain counsel at all. Few civil forfeiture cases ever proceed to trial as a result of these legal and practical obstacles. In a criminal forfeiture case, by contrast, there is a constitutional right to court-appointed counsel for indigent defendants and every case must be decided by a jury after a trial on the merits unless the defendant chooses to waive his or her right to a jury verdict on the forfeiture allegations.

The fact that not all states have similar criminal forfeiture statutes cannot justify dispensing with this deep-rooted constitutional protection. Rather, the solution is for the state legislatures to enact criminal forfeiture provisions.

Such combined proceedings have been used even in the absence of explicit statutory authority. See, e.g., United States v. One 1976 Mercedes Benz 280 S, 618 F.2d 453, 468 (7th Cir. 1980); United States v. Young, 426 F.2d 93 (6th Cir.), cert. denied, 400 U.S. 828 (1970); United States v. Real Property, 816 F.Supp. 1077, 1085 (E.D.Va. 1993). The government is using combined proceedings now in gambling cases under 18 U.S.C. §1955--belying its contention that such a hybrid proceeding is not possible.

Criminal forfeitures are not only more fair - they are also more efficient than bringing separate civil proceedings. The Department of Justice has been urging prosecutors to make greater use of criminal forfeiture statutes for years, not because of concern about double jeopardy problems, but simply to promote the efficient use of limited prosecutorial and judicial resources. See, e.g., "Need for Increased Emphasis on Criminal Forfeiture," Memorandum from George J. Terwilliger, Principal Deputy Associate Attorney General, to U.S. Attorneys (April 22, 1991); Gary M. Maveal, The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures, 30 Am.CRIM.L.REV. 35 (1992). Congress recognized that unitary proceedings are more efficient when it greatly expanded the scope of the criminal forfeiture statutes in 1984. S. Rep. No. 225, 98th Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3393 ("filt is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings"). Thus, the decisions of the Sixth and Ninth Circuits encourage the government to follow a policy preference long promoted by the Department of Justice and Congress.

29

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit in No. 95-345, and the judgment of the Court of Appeals for the Ninth Circuit in No. 95-346, should be affirmed.

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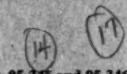
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March 22, 1996

MAR 27 1995



Nos. 95-345 and 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner.

V

GUY JEROME URSERY,

Respondent.

United States of America,

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V.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS (\$405,089.23)
IN UNITED STATES CURRENCY, Et Al.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

MOTION OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS FOR LEAVE
TO FILE AMICUS CURIAE BRIEF OUT OF TIME
IN SUPPORT OF RESPONDENTS

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COMES NOW the National Association of Criminal Defense Lawyers and respectfully moves the Court for leave to file an out of time brief amicus curiae in support of Respondents.

The brief was received by the Court at ten p.m. on March 22, 1996. It should have been filed by three p.m. on that date. The delay resulted from a mis-communication between counsel and the printer as to the hour that the brief was due.

Respectfully submitted,

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March 27, 1996



